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**DEMOCRACY AND COMMUNICATIONS:
AN ANALYSIS AND ASSESSMENT
OF THE
PUBLIC PARTICIPATION PROGRAMME
OF THE
CONSTITUTIONAL ASSEMBLY**

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THESIS ABSTRACT

This thesis analyses the Public Participation Programme in the South African constitution-making process. The central premise of the thesis is that there is a link between participatory lawmaking processes and legitimate democracy. Accordingly, the drafting of the constitution and other law requires public participation in order to be accepted and recognised.

Jürgen Habermas' latest theory (*Between Facts and Norms*) is used in this analysis. Jürgen Habermas has developed a new theoretical paradigm that defines the tension that exists between the coercive factual force of law ("facticity") and the recognition of law ("validity"). Habermas takes into account that modern democracy is made up of a complex web of social relationships - defined by pluralism and a lack of homogeneity. According to Habermas, this post-metaphysical or post-traditional reality poses certain challenges for a modern democracy. He argues that these challenges force society to look at alternative ways to establish common legal norms - legal norms that everybody can come to recognise. In this regard, he proposes a discursive lawmaking process. This process is explained by a participatory approach in which the public sphere, and particularly civil society in the public sphere, have the opportunity to influence the institutionalised lawmaking process. Habermas believes that civil society structures such as public interest groups are important in this regard. These groups identify social problems, they are able to formulate these problems and they resonate the experiences of the private sphere.

It is argued in this thesis that the challenges of law and the tension between facticity and validity in South Africa have specific historical characteristics that are different from the kind of challenges that established democracies are currently faced with. However, in a country such as South Africa, with a history defined by political and social polarisation, Habermas' theoretical

paradigm provide both an understanding of the particular challenges of law and democracy and the necessary mechanism to deal with this tension.

The thesis examines the various mechanisms used in the Public Participation Programme of the Constitutional Assembly in relation to Habermas' theory. The Constitutional Assembly's objectives, strategies and the implementation of the Public Participation Programme are presented and analysed. Documentation from the Constitutional Assembly provide detail of both strategies and implementation. Various evaluations of the programme which were conducted by the Community Agency for Social Enquiry and Roots Marketing and Research, give an indication of the impact and reach of the Public Participation Programme. Further, these evaluations give an outside perspective of how the programme was implemented.

The Head of the outreach component of the Constitutional Assembly's Public Participation Programme was interviewed in order to provide further clarification and detail about the mechanics of the programme. Interviews with relevant civil society stakeholders were conducted. These interviews provide evidence of how the participation process was perceived. All interviews were open-ended and they lasted approximately an hour. The interviewees were asked how they participated, whether they believed they had any impact, how they perceived the process and what issues they had raised. Newspaper articles and literature on the subject were also used in order to establish how the process was perceived.

The thesis found that the Constitutional Assembly demonstrated an implicit understanding of the tension between facticity and validity. The Constitutional Assembly also showed a commitment to deal with this tension. By using plain language and educating the public about the process, the programme was made inclusive and accessible to people who would otherwise have been excluded. The process afforded both national and community based civil society structures an

opportunity to influence the institutionalised decision-makers. In terms of Habermas' theory, it is unavoidable that some groups in the public sphere have more influence than others. What is important is that the more influential groups articulates the social experiences found in the private sphere. The thesis found that the Constitutional Assembly was open to input from human rights organisations and other public interest groups. The constitution-making process confronted the political and social challenges of South African society, and the public participation programme reflected an understanding of the relationship between law and democracy both in the design and the execution of the programme.

LIST OF ABBREVIATIONS

ANC	African National Congress
ACDP	African Christian Democratic Party
CA	Constitutional Assembly
CC	Constitutional Committee (of the Constitutional Assembly)
CEP	Constitutional Educational Programme
CODESA	Conference of a Democratic South Africa
COSATU	Congress of South African Trade Unions
CPM	Constitutional Public Meetings
DP	Democratic Party
FF	Freedom Front
IFP	Inkatha Freedom Party
MC	Management Committee (of the Constitutional Assembly)
NP	National Party
NSHP	National Sector Hearing Programme
PAC	Pan African Congress
PPP	Public Participation Programme
TC	Theme Committee (of the Constitutional Assembly)
UDF	United Democratic Front

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1. INTRODUCTION

What makes a modern democracy legitimate? How can law achieve recognition? What *is* a "democratic culture"? Modern societies are faced with a number of challenges. Society has developed into a complex web of social relationships - democracy is consequently facing increasing pressures. The post-metaphysical character of modern society and its lack of homogeneity have changed the idea of the "collective will". For democratic institutions, to be accepted, they cannot always rely on shared traditions. It can be argued that the old established constitutional frameworks, found in long standing Western democracies, do not take modern complexities sufficiently into account. Further, the increasing specialisation, technocratisation and bureaucratisation has removed citizens from the public sphere. Established democracies are faced with challenges that cannot always be met through by to traditions and common world views.

South Africa, on the other hand, has only recently become a democracy. The challenges faced by South Africa during its transition to democracy, were far greater than those confronting established democracies in the late 20th century. In South Africa, the concept of democracy, a democratic culture and the rule of law had to be consciously constructed for the first time. The situation in South Africa can be compared to the democratic transitions in Eastern Europe. Andrew Arato, in analysing the constitutional arrangement of Eastern European countries' in their transition to democracy says:

"The task of making or producing a valid and accepted constitutional arrangement remains logically, politically and normatively a pre-eminent one for those wishing to avoid the destructive logic of yet another authoritarian system perhaps with different colours."¹

¹Andrew Arato: "Constitution and continuity in the Eastern European transitions. Part 1: Continuity and Crisis", *Constellations*, Volume 1, No.1 1994, p. 93.

Arato argues that the problems of transition to constitutional democracy in countries such as Hungary, Poland and Bulgaria are linked to the constitution-making process itself. When the new constitution does not "emerge as the result of democratic participation", the system will lack a fundamental source of legitimacy.² According to Arato, the public is alienated by the continuity of the old order's political illegitimacy and the élitist nature of the post-Cold War political processes in these countries. Arato advocates a form of deliberative democracy in which the decision-makers establish democratic practices that are open to public participation. His arguments about the constitutional arrangements in countries during transition to democracy, emphasise the importance of participatory constitution-making processes in countries such as South Africa.

South Africa commenced its transition to democracy in 1990. On 2 February 1990 former state president F.W. De Klerk delivered a speech in Parliament which signalled the start of a new political climate for South Africa.

"The growing realisation by an increasing number of South Africans that a negotiated understanding among the representative leaders of the entire population is able to ensure lasting peace (...) The aim is a totally new and just constitutional dispensation in which every inhabitant will enjoy equal rights, treatment and opportunity in every sphere of endeavour - constitutional, social and economic."³

In the same speech, De Klerk announced the immediate unbanning of the liberation movements.

Before a democratic dispensation could be established, the National Party (NP) and the liberation movements, most notably the African National Congress (ANC) began negotiating a framework to take South Africa through its transition to democracy. The constitutional negotiations commenced in 1990 and ended with the ratification of the Interim Constitution on 18 November 1993.

²ibid. p. 103.

³Hassen Ebrahim: *Soul of the Nation*, p. 466.

In terms of section 68 (1) of chapter 5 of the Interim Constitution, Act. No. 200, 1993, "the National Assembly and the Senate, sitting jointly for the purpose of this chapter, shall be the Constitutional Assembly. The Constitutional Assembly shall draft and adopt a new constitutional text in accordance with this Chapter." The Constitutional Assembly (CA) had 490 members⁴ who had been democratically elected in the election on 27 April 1994. The newly elected CA was accordingly tasked with drafting the new and "final" constitution of South Africa.

Schedule 4, Act 200 1993 of the Interim Constitution outlined 34 Constitutional Principles. These principles provided the CA with both a framework for the constitution and a set of conditions with which the CA had to comply. The Interim Constitution imposed a timeframe of two years for the drafting process.

When the CA began the drafting process, it resolved that "public participation" should be an integral component of the constitution-making process:

"The new Constitution should be the result of a process which integrates the ideas of political parties represented in the CA, civil society and the broader public."⁵

The CA decided there would be a Public Participation Programme (PPP) based on the following principles: Accountability, legitimacy, inclusivity, empowerment, accessibility, transparency, credibility, consultation and the creation of constitutional awareness.⁶ Two departments were set up within the CA administration to implement the PPP, the Community Liaison Department and the Media Department. The PPP contained a number of mechanisms. Constitutional Public Meetings (CPMs) were planned in order to give grassroots communities an

⁴The National Assembly had 400 members and the Senate had 90 members.

⁵CA: Work Programme 1995. Management Committee 28 November, p. 6/ CA resolutions 2 September 1994, p. 5 (CARes).

⁶Constitutional Assembly: "Public Participation - A strategic overview". 31 October 1994.

opportunity to participate. A National Sector Hearing Programme (NSHP) was designed to involve national civil society structures in the constitution-making process. The public could also make submissions by writing or phoning the CA. Further, the CA outlined a Constitutional Education Programme (CEP) which was designed to educate the public about constitutional issues, the constitution-making process and how to participate. A comprehensive media campaign to inform the public about the process was also planned - this included an internet site and a newsletter.

The central premise of this thesis is that there is a link between participatory lawmaking processes and legitimate democracy. The latest theory of Jürgen Habermas deals with the challenges facing contemporary democracy. According to Habermas, there is a problematic duality in law. He describes this duality as a tension between facticity and validity. Habermas argues that pluralism and a lack of homogeneity in modern democracies, places further strain on the tension between facticity and validity. To solve this tension, Habermas proposes a form of deliberative democracy in which discursive law-making processes is the central criterion. If citizens participate in lawmaking processes, they will come to recognise and accept the inherent coercion found in law. Thus, Habermas' theoretical paradigm provides an understanding of discursive lawmaking in relation to the rule of law. Further, according to Habermas, the lawmaking process is itself linked to, and essential to the creation of legitimacy in modern democracies.

His latest theory offers both established democracies and emergent democracies a new concept that reviews the notion of legitimacy in modern democracies. Long standing democracies need to take into account the lack of shared traditions and create a participatory culture in order to make democracy meaningful to everyone. South Africa, in its transition to democracy, needs to replace suspicion and illegitimacy with acceptance, recognition and legitimacy.

South Africa has to establish a new democratic culture which is based on public participation in the institutionalised political processes.

Habermas latest theory is used as a framework for analysing the South African constitution-making process. On the basis of the Habermasian discursive law-making paradigm the thesis will argue why a such a participatory approach is necessary in the South African context. Further, an analysis of the mechanisms that were used in the PPP, will determine whether the design and the implementation of the PPP is compatible with Habermas' criteria for discursive law making.

Some commentators have questioned whether the submissions from the public had an impact on the constitution-making process and the constitution itself. Political analysts such as Steven Friedman and Siri Gloppen argue that the CA did *not* take public submissions seriously.⁷ However, as Gloppen notes, it is impossible to "establish the precise extent to which the submissions from the public influenced the negotiation process and the content itself...there are too many interacting factors, too many patterns of influence."⁸ This thesis will therefore not attempt to establish the direct impact of the submissions on the constitution, but rather analyse the processes through which these were made in order to determine whether the PPP met with Habermas' criteria of discursive lawmaking. The impact of the submissions will only be discussed briefly in relation to Habermas' theory and the above mentioned comments.

Chapter 2 establishes the theoretical framework for the thesis. Habermas' latest book *Between Facts and Norms. A Contribution to a Discourse Theory of Law and Democracy*, is used as the theoretical framework for this thesis.⁹ Chapter 2

⁷Steven Friedman: "Don't be fooled by the illusion of public consultation", *Business Day*, 4 September 1995 / Siri Gloppen: *South Africa: The Battle over the Constitution* (1997).

⁸Gloppen: p.260.

⁹When referring to *Between Facts and Norms. A Contribution to a Discourse Theory of Law and Democracy*, the thesis will use the terms "latest theory" or

explains why Habermas' latest theory is the most appropriate to deal with the demands of modern democracies. This chapter also explains how Habermas' latest theory is relevant and important in the context of the South African constitution-making process. The use of Habermas' theoretical paradigm necessitates an overview of relevant theories of law, democracy and legitimacy. These theories will be discussed in relation to Habermas' theory.

Chapter 3 sets the scene for the constitution-making process. The chapter briefly outlines the dynamics between apartheid law and the public sphere. This historical overview demonstrates why discursive lawmaking in post-apartheid South Africa is particularly important. The chapter also provides a background to the implementation of the constitution-making process. The political processes, the planning and the strategic development that occurred before the implementation of the participation programme are outlined. This will provide an indication of whether the CA - normatively - took into account the tensions that Habermas describes and analyses in his theory.

Chapters 4 and 5 explain and analyse the implementation of the PPP. Chapter 4 focuses on the face-to-face outreach component of the PPP. A detailed explanation of the CPMs, the CEP and the NSHP is given, and the implementation of these are examined and analysed in relation to Habermas' theory. In chapter 5 the media and its role in the PPP is explained and discussed. Chapter 6 will summarise the findings of the thesis and restate the argument of the thesis.

In order to examine the PPP, material from the CA is used. Documentation from the CA outlines the strategy and the planning of the programme. Annual Reports of the CA, documentation from the meetings of the Management Committee and the Constitutional Committee give details of how the PPP was planned and implemented. Further, internal memoranda, letters, various

"most recent theory". In footnotes, this book will be referred to as *Between Facts and Norms*.

interdepartmental workshop minutes, minutes from meetings at the relevant departments, administrative planning documents and the CA workshop manuals provide information about the design and implementation of the PPP. The Head of the Community Liaison Department was interviewed in order to provide greater detail to some aspects of the programme.

The CA sub-contracted two agencies to conduct "independent" evaluations of the programme. The evaluations were conducted by the Community Agency for Social Enquiry (CASE) and Roots Marketing & Research.¹⁰ The findings of the evaluations establishes the impact and reach of the PPP. These findings will be used in the thesis.

In addition, a number of civil society stakeholders were interviewed in order to assess the process in terms of the theoretical framework and the objectives of the CA. The stakeholders that have been interviewed for this thesis, were active in the constitution-making process. Accordingly, their observations are useful in assessing the PPP.

There is unfortunately not much independent literature on the public participation process of the CA. Much of what has been written is based on *perceptions* rather than *analysis*. However, relevant newspaper articles will be used in order to establish perceptions of the constitution-making process. Siri Gloppen's assessment of the PPP will be discussed in relation to the face-to-face outreach component of the process.¹¹ Her analysis of the Interim Constitution, the CODESA negotiations and the ANC's position on "participatory formulation of rights" are used in chapter 3.

¹⁰It should also be borne in mind that these agencies were paid sub-contractors of the CA. However, their brief was to conduct independent evaluations of the PPP. The evaluations do point out various shortcomings in the constitution-making process. These will be presented and discussed in Chapter 4 and Chapter 5.

¹¹It is important to note that the main focus of her work is *not* the CA's Public Participation Programme. Her book, *South Africa: The Battle over the Constitution* deals with various constitutional models relevant to the South African political context. Her main focus is substantive rather than process-related.

2. THEORETICAL FRAMEWORK

2.1 Introduction

Modern democratic societies are faced with challenges that require a reformulation of the concept of legitimacy. Western democracies, finding themselves in a post-traditional and post-metaphysical reality can no longer rely on the collective worldview that historically defined them as democratic societies. The deep social and political divisions and the plurality of cultures, posed some serious challenges for South Africa, in its transition to democracy. Finding a common norm that has the force and power to bind the country together, has therefore been particularly important in a country such as South Africa.

Habermas' most recent theory takes into account the above mentioned complexities. The central premise in his recent work is that rule of law is internally related to deliberative democracy. According to Habermas, modern democracy can only achieve legitimacy if policy- and law-making processes are discursive. Habermas analyses the tension of the duality of law comprehensively and provides an understanding of the multifaceted complexities of legal norms. He introduces discursive lawmaking processes as a mechanism to solve the tension that exist between coercive legal norms and the normative ground that these rest upon.

His understanding of this tension and his solution to the challenge, is relevant in the context in which the South African constitution was drafted. In order to substantiate this theoretical approach, an overview of the development of the concept of legitimacy is outlined. Further, theories on democracy and legitimacy are discussed in relation to Habermas' approach. This will provide both a background to, and an understanding of, his theoretical paradigm. It will also explain why these theories fail to sufficiently deal with the complexities of

modernity. Lastly, a detailed account of his theory is provided. The emphasis will be on his recent theory. However, an outline of his earlier work is important, as it provides a background to and an understanding of his present theoretical paradigm.

2.2 The age of modernity: Setting the scene

The Enlightenment period was an epoch in Western history that marked the transition from absolute monarchies to emerging democracies. During the Enlightenment, a new belief in the "will of the people" changed perceptions about how to legitimise power. The intellectual currents in the Enlightenment period was characterised by its belief in "progressive universalism", where social and political equality, individual freedom and a collective self-determination, were emphasised.¹²

The intellectual developments in the late 18th and 19th century both informed and stirred political events. During and after the French Revolution the perception of how human beings defined themselves as citizens changed. There was a new belief in the human being as a *rational* being. Accordingly, human beings were regarded as citizens, and as such, participants in the political community. One of the common features in these emergent democracies was the creation of a system where power could be curbed and controlled. In countries such as France and America, a constitutional framework was introduced in order to guarantee civil liberties as well as limit governments by virtue of the power of law.¹³

¹²David Abraham: "Persistent Facts and Compelling Norms. Liberal Capitalism, Democratic Socialism and the Law", (Law and Society Review, Vol 28, No. 4, 1994), p. 939.

¹³Hannah Arendt: *On Revolution* (1990), pp. 145-146.

In the late 20. century "progressive universalism" remains the fundamental principle of democratic societies. There are, however, many different views of how to *implement* the idea of progressive universalism. In the course of socio-political history, the concept of democracy has developed new interpretations and meanings as it has had to face more complex challenges. It is also important to bear in mind that the political paradigm which emerged in the Enlightenment was a bourgeois reaction to absolute monarchy. The bourgeoisie demanded rights that would enable them to participate in the political realm. The emerging reasoned *homme politique* was literally that; a white man that belonged to a certain class. Although the definition of democratic legitimacy is in most cases based on the same principles as that of the 19th century democrats, the interpretation of these principles has been broadened to encompass the previously excluded groups.¹⁴ Today, political rights of all citizens regardless of sex, class and race is seen as a fundamental principle in a legitimate democratic order. The understanding of legitimacy has shifted, and new aspects of the concept of legitimacy have emerged.

Bureaucratisation, specialisation, technocratisation, interventionism and the general development of depoliticised structures have given many reason to criticise modern democracy. It has been argued that a new instrumental rationality has forced citizens into a private sphere and accordingly removed the citizenry from the public sphere in which political decision-making takes place.¹⁵

¹⁴Colonialism added another dimension to the idea of equality and recognition of rights. The exclusion that was based on race and colour was still prevalent well into 20th century. South Africa possibly offers the most brutal example of racial exclusion. The apartheid system institutionalised segregation and reduced the majority of its people to second and third class citizens who did not enjoy even the most basic of human rights.

¹⁵This view has been advocated by political philosophers such as Hannah Arendt (*On Revolution*) and by neo-marxists such Habermas and members of the Frankfurt school. The Frankfurt School will be discussed in relation to Habermas' theory, later in this chapter.

2.3 Modernity: The complex challenges of democratic legitimacy

Corresponding to the development of the western world, the politico-theoretical understanding of democracy has changed. There is a constant quest to redefine the role of the citizen as society changes, develops and becomes increasingly complex. Theories that emerge are both a reflection of society as it is perceived at the time and a criticism of democratic ideals that do not take societal realities into account. Accordingly, political philosophers and theorists are both political commentators of their contemporary reality and instigators for change. This section will present and discuss theories that are relevant to the central premise of this thesis; the link between modern lawmaking and legitimate democracy. The theories that are outlined below will be examined in relation to Habermas' theoretical paradigm.

Rousseau understood the legitimate order to be based on freedom. Rousseau was aware that the new political freedom was constrained by the coercive authority which characterises a modern political community. "Man was born free, and he is everywhere in chains".¹⁶ Rousseau believed that in order to render these chains legitimate, society had to be transformed from one based on domination to one based on self-rule. Rousseau argued that human freedom was reached through political participation, not through the pursuit of private preferences.¹⁷

According to Rousseau, the development of society, language and reason gave human beings a moral will which was seen as the basis for a legitimate order.¹⁸ Rousseau advocated the concept of civic republicanism. In terms of this

¹⁶Jean-Jacques Rousseau: *The Social Contract in Political Writings* (1953), p. 3

¹⁷ibid. pp. 18-19.

¹⁸Jean-Jacques Rousseau: *The Social Contract*, 1994, pp. 45-46, p. 54-58 or pp. 14-15 in 1953 edition.

approach, democratic processes by way of collective deliberation will lead citizens to reach agreement on the common good.¹⁹ Accordingly, the legitimacy of law depends on popular sovereignty which is achieved through the establishment of a social contract.

A different politico-theoretical tradition was established by John Locke. The liberal conception of society that Locke promoted, was based on the impersonal rule of law and the protection of individual freedom.²⁰ John Locke presented an instrumental concept of the state in terms of which the purpose of the state is only a mechanism to serve the needs of its citizens. Further, one of the characteristics of this liberal tradition, is its emphasis on human rights.

Habermas recognises elements within both traditions. He argues that both individual human rights and popular sovereignty play important roles in society. However, Habermas points out that in Rousseau's writing the emphasis on shared tradition implies that civic virtue and the common good are reflections of an homogenous society. According to Habermas, this does not sufficiently take into account the complexities of society.²¹

On the other hand, Habermas argues that the Lockean liberal tradition runs the risk of "tyrannical majorities". Habermas recognises the requirement of human rights as moral rights. However, he qualifies this by saying that these cannot be "paternalistically" imposed and pre-given as moral facts "that merely need to be enacted as positive law."²² Habermas argues that citizens must be able to understand themselves as the authors of the law they are subjected to.

Immanuel Kant's views can be seen as a continuation of both political traditions. His political writings reflect an emphasis on the individual in society.

¹⁹Jean-Jacques Rousseau: *The Social Contract in Political Writings* (1953), p. 33.

²⁰John Locke: *Political Writings* ("The Second Treatise of Government"), (1993), pp. 328-334 (§134-142).

²¹Jürgen Habermas: *Between Facts and Norms* (1997), p. 102.

²²*ibid.* p. 453.

He was also aware of the problems of the Rousseauian "chains" - the coercion that confronted rational human beings in the political community. Kant said that "each individual must be convinced by reason that the coercion which prevails is lawful."²³ Kant maintained that the legitimacy of the rights that defined individual liberty was based on a universal principle of law (Rechtsprinzip). His moral conception of law was explained as "the freedom of each individual's will to co-exist with the freedom of everyone else in accordance with universal law."²⁴ Kant dealt with the duality of coercion and freedom by introducing the concept of the "phenomenal" being and the "noumenal" being. While the phenomenal world can be proved empirically, the noumenal world is based on reason. The noumenal realm opens up a secondary reality where the human being can exist as a free moral being. Kant thus offers a dual perspective of reality, he separates the "is" (phenomenal) from the "ought" (noumenal), where the "is" is subordinate to the "ought".²⁵

In his political writings, Kant displays an understanding of the tension that exists in law. In Habermas' work, this is presented as the tension between facticity and validity. How does one enforce law by means of general recognition? This is a simple question that requires a complex answer. Kant's response was based on a universal rational acceptability where universal freedom deserved the respect of moral subjects and accordingly could be claimed to be legitimate. Habermas however, argues that the Kantian understanding of law as subordinate to morality, fails to take into account the empirical world and accordingly presumes a consensus prior to actual public discourse.²⁶ Further, according to Habermas, the

²³Immanuel Kant: *Political Writings* (1970), p.85

²⁴ibid. p. 133.

²⁵ibid. pp.136/ 68-72.

²⁶Jürgen Habermas: *Between Facts and Norms* (1997), pp. 450-451.

problem with normative universalisation, is that it is disposed to "ethno-centric fallacies".²⁷

Contrary to Kant, Georg Wilhelm Friedrich Hegel attempted to situate norms in the empirical world. Through this, he found not only a moral justification for these norms, but the applicability of universalistic morality. Hegel was highly critical of the Kantian "ought" and "is". He developed the concept of ethical life (*sittlichkeit*) which he defined as the righteousness that people are capable of, but only by virtue of their membership of a community and their participation in communal affairs.²⁸ Hegel's concept of ethical life is an implicit criticism of individualism. His political philosophy formulates the moral purposive state. Hegel's idea of the state represents a human rationality which transcends the separate wills of the people. This implies that the individual's identity can only be understood in the broader context of a collective consciousness.²⁹

Karl Marx wrote a critique of Hegel's *Philosophy of Right*. In this work, he grapples with the same issues that had been the focus of the Enlightenment philosophers; the tension between *homme* and *citoyen*. Marx' criticism of Hegel is based on the premise that the relationship Hegel establishes between the empirical and ideal orders is illusionary and sophistic.³⁰ Marx argues that Hegel's institutional conclusions fail to take into account man's social life and accordingly his social nature. According to Marx, Hegel provides a correct description of society. However, this picture of the political state is not the objectification of the sentiment of the people. Rather, it represent the objectification of private property in its most anti-social and anti-political form.³¹ Marx argues that genuine human emancipation is only achieved through the elimination of the

²⁷Jürgen Habermas: *Moral Consciousness and Communicative Action* (1990), p. 197.

²⁸G.W.F. Hegel: *Philosophy of Right* (1967), § 150, pp. 107-108.

²⁹*ibid.* pp. 155-160.

³⁰Karl Marx: *Critique of Hegel's Philosophy of Right* (1970), pp. 10, 12, 18-19, 64.

³¹*ibid.* p. lvi.

conflict and duality between the general interest and the private interest. The individual must live as a species being. This is only achieved in a society that abolishes the preconditions of private property and money.³²

Although Marx himself was, at least partly, critical to Hegel's theory, Hegel's theory has influenced neo-Marxism. One can find elements of "left-Hegelianism" in the theories developed by the neo-Marxist Frankfurt school. In this regard, neo-Marxists were inspired by Hegel's notion of the collective will which transcends the individual will. The members of the Frankfurt School argued that true rationality should form the basis for speech and political practice. Implicit in this argument was a criticism of the modern capitalist state which is characterised by the domination of instrumental rationality and strategic action.³³ This view is also shared by Habermas. However, whereas many neo-Marxists have been more inspired by Hegel, Habermas found the Kantian problematisation of the duality of politics and morality an important point of departure for his own theory. Kant's philosophy has to be seen to offer the first theoretical understanding of bourgeois publicness. In his writing, the *bourgeois* is merged with the *homme*, and the private economy is perceived as part of the natural order, constructed in such a way that justice is an immanent part of commerce. The new civil society that emerged was therefore a justifiable and natural part of reality. Hegel, on the other hand, offers the first critique of civil society. He denounces the public of civil society as an ideology and he calls civil society "a system of needs".³⁴

Max Weber was the first theorist to bring the concept of legitimacy into the 20th century. Weber defined legitimacy as people's belief in a given system in a given society. He proceeded to analyse the legitimacy of power from rational,

³²ibid. pp. lviii-lix.

³³The Frankfurt school and critical theory will be discussed later in this chapter.

³⁴G.W.F. Hegel: *Philosophy of Right* (1967), p. 126.

traditional and charismatic points of view.³⁵ The traditional justification for legitimacy was maintained and based on the habitual attitudes of the people. Charismatic legitimacy needed, according to Weber, an individual leader who had the ability to create justifications through his or her personality. In modern society, however, where legitimacy cannot rely on traditional authority, bureaucracy will assume the legitimising role, maintained Weber. Weber argued that pluralisation has undermined common religious authorities and homogenous worldviews. Legitimacy can accordingly only be legal-rational in the modern post-traditional and post-metaphysical context. This last analysis rests on rational legality where a belief in the validity of rational legal laws and the competence of the civil service are constructed around rationally structured rules. Thus, the constitutional state's legitimacy is premised on a legal medium and abstract rules. This, according to Weber, is where political power can be exercised, and *not* through a political deliberation process.

Weber sets the scene for a modern reconstructed understanding of law that Habermas agrees with. However, Habermas is critical of what he interprets as a Weberian instrumental rationality which fails to take into account the tension between facticity and validity.³⁶ Habermas argues that democratic legitimacy can only exist where there is political opinion and will formation through deliberation and participation by the citizens.³⁷

In the late 1950's, the American sociologist Seymour Martin Lipset offered a different sociological account of legitimacy. His approach has been characterised as a liberal-pluralist approach.³⁸ Lipset has also been described as an "end-of-ideology" theorist.³⁹ According to Lipset, the ideological battle has been solved.

³⁵Max Weber: *Makt og Byråkrati* (1971), p. 5.

³⁶Jürgen Habermas: *Between Facts and Norms* (1997), pp. 68-69.

³⁷*ibid.* p. 73. This view will be elaborated upon in 3.4.

³⁸Rodney Barker: *Political Legitimacy and the State*, (1990), p. 74.

³⁹David Held: *Models of Democracy* (1987), p. 225.

The post-political society has reached its objective. The workers have achieved their political citizenship and the conservatives have accepted the welfare state. Lipset believes that the various ideological positions have been incorporated into the "legitimate body politic."⁴⁰ Lipset argues that legitimacy depends on the way that society has solved the historical ideological divisions that existed within society. According to Lipset, this is obtained by accommodating and respecting the various value systems.

"Groups regard a political system as legitimate or illegitimate according to the way in which its values fit with theirs...Thus one main source of legitimacy lies in the continuity of important traditional integrative institutions during a transitional period in which new institutions are emerging"⁴¹

This indicates that Lipset gives a causal sociological account of the legitimacy of government. The role of the state is to balance groups and institutions in society, thus gaining their loyalty and support. According to Lipset, a crisis of legitimacy only occurs when access to politics is denied.

On the other hand, sociologist and system theorist Niklas Luhmann has taken up the legacy of Weber's theory of legitimacy. Luhmann's work can be seen as a continuation and development of Weber's work. While he acknowledges and agrees with Weber's idea of justification based on belief, he emphasises legality as an essential element of legitimacy. Luhmann's understanding of legal and rational legitimacy arises from a procedural basis. His juridico-procedural approach is explained as a social system which is founded on "functional differentiation".

"Their legitimating function is based upon the role of differentiation. In procedure, participants obtain particular individual roles as voters, representatives, plaintiffs, defendants, claimants, judges presiding over a hearing etc. In procedures in

⁴⁰Seymour Martin Lipset: *Political Man* (1960), p. 92.

⁴¹ibid. pp. 77-79.

which they can behave freely, but only according to the rules of the procedural systems - and not just directly as husbands, sociologists, trade unionists or doctor. Their behaviour is therefore detached from the natural context of their daily lives."⁴²

Luhmann holds to a legal positivist approach where law is regarded as legitimate if it has been enacted in accordance with established legal procedures. These legal procedures form the basis of a legal-rational legitimacy within the system of government and administration. Luhmann believes that searching for "ideal" theories of legitimacy is futile.

According to Luhmann's system theory, complex organisation is achieved at an anonymous macro-level rather than through the direct intentions of individual participants. Habermas maintains that the Luhmannian system-theoretical concept does not solve the problem of the acceptability of law from the addressees point of view. Habermas re-emphasises his belief that law cannot ignore the participants normative understanding of their legal system.⁴³

American moral philosopher John Rawls also provides an endorsement of existing liberal practices. Rawls emphasises the importance of procedure in his theory of justice, and he assumes that in discourse there is a level of moral duty which will ensure rational procedures. Rawls advocates a principle of liberal legitimacy where the exercise of political power is justified when it is exercised in accordance with a constitution. He maintains that the justification and acceptance of these principles derive from their expected rationality and reasonability. This legitimacy, he claims, presupposes a moral duty:

"And since the exercise of political power itself must be legitimate, the ideal citizenship imposes a moral, not legal duty - the duty of civility - to be able to explain to one another on those fundamental questions how the principles and the policies they advocate and vote for can be supported by the political values of public reason. This duty involves a willingness to listen to others and fair-mindedness

⁴²Alberto Izzo: "Legitimation and society", *Current Sociology* 1987, p. 50. Izzo is quoting Niklas Luhmann from his book: *A Sociologist Theory of Law* (1985), p. 203.

⁴³Jürgen Habermas: *Between Facts and Norms* (1997), pp. 48-51.

in deciding when accommodation to their views should be reasonably made."⁴⁴

According to Rawls, democracy can be defined as a political relationship between citizens where the citizens share the coercive political power through democratic mechanisms such as voting. Rawls applies the term "overlapping consensus" to explain the fundamental principles of justice. This concept implies that there is a common system of rights and liberties in the political culture which serves as a basis for the public allegiance necessary to maintain that system over time. He describes this consensus as "overlapping" because it does not depend on homogenous or common moral and philosophical viewpoints, but rather on a unified agreement with respect to the principles of justice in terms of which a pluralist and post-metaphysical society can function.⁴⁵

Rawls' theory of overlapping consensus appeals to societies such as established constitutional democracies, with shared traditions and a relative common worldview. According to Habermas, Rawls fails to address the issue of how legal institutions are able to realise such ideals in societies where powerful interests and complex functional requirements dominate. Further, Habermas argues that Rawls fails to take into account problems such as bureaucratisation, powerful corporate interests and the apathy of the citizenry. Accordingly, in Habermas' view, Rawls' theory does not sufficiently appreciate the social facticity confronting constitutional ideals. In Rawls' theory there is an assumption that just institutions already exist. Like Hegel, Rawls maintains that the individual's morality (moralität) finds its ethical (sittliche) context in the institutions of a just society. The self-stabilisation of a well-ordered society is accordingly, not based on the coercive force of law, but rather on the socialising force of life under just

⁴⁴John Rawls: *Political Liberalism* (1993), p. 217.

⁴⁵ibid. pp. 131-72.

institutions. Habermas claims that Rawls fails to explain how these can be established or promoted.⁴⁶

Rawls and Habermas share a common objective. Both believe that rational persuasion must replace coercion. Rawls postulates a set of "goods" or principles of justice, that he believes are necessary to exercise our moral powers. In this regard, he formulates the concept of "original position". The original position is an artificial construction in which the agreement on the principles that are to regulate institutions of the basic structures, should not be influenced by cumulative social, historical and natural tendencies. He then attributes to each participant an identical interest in pursuing these principles. The agreement reached by the parties must be hypothetical and non-historical.⁴⁷ Habermas however, prefers not to stipulate in advance which interests should serve as motivation for the participants. He believes that the individual should judge for herself what is in her best interest.⁴⁸ Habermas argues that by introducing a substantive list of goods as Rawls does in his formulation of the original position, he denies participants the freedom to interpret and understand their needs and interests in their own way. There is therefore a difference between Rawls' original position and Habermas' practical discourse.

The above examination of modern political theories of law, democracy and legitimacy has shown that the establishment of legal norms in a democratic society faces complex challenges. Can we assume that the addressees of law share a common moral worldview? Can citizens recognise and respect law that has been formulated by experts?

Earlier political philosophers such as Rousseau, Kant and Hegel, to some extent, took a shared tradition and a common worldview for granted. It must be borne in mind that the political reality of the West in the late 18th and 19th

⁴⁶Jürgen Habermas: *Between Facts and Norms* (1997), p. 58.

⁴⁷John Rawls: *Political Liberalism* (1993), pp. 23-28.

⁴⁸Habermas: *Moral Consciousness and Communicative Action* (1990), p. 67.

century did indeed reflect commonalities with regard to metaphysics and tradition. However, contemporary democracies cannot readily assume such a common moral worldview. The pluralisation, the polarisation and the lack of homogeneity that characterise a contemporary society challenge the old perceptions of legal norms and democracy. Accordingly, new ways of finding common ground is required. This is particularly necessary for a country such as South Africa. In the transition from a troubled political past to a democracy, these challenges becomes even more important. Habermas takes the post-traditional challenges into account when he formulates his reconstructive paradigm of law.

Habermas regards the Weberian legal-rational legitimacy as inadequate for dealing with "the disenchantment of the world." As mentioned above, Habermas believes that citizens must participate in the laws that govern their society. This is also why he disagrees with Luhmann's approach. It seems that Luhmann defines legitimacy within the framework of a hierarchical power structure - citizens are regarded as mere passive recipients, ruled by a law that has been promulgated by an "expertocracy". It appears that he views a vibrant political sphere outside the political and administrative realm as a threat to order. Accordingly, other than with regard to their prescribed role in the private and public realm, Luhmann appears to have no understanding of, or interest in people as complex, politicised agents in society. Luhmann's idea of functional differentiation reflects a static role-play where ordinary citizens do not have the opportunity to influence the institutional subsystems other than in their "public" role. Thus, it can be argued that his understanding of legitimacy is paternalistic, and his characterisation of society reflects an infantilisation of its citizenry.

Before 1994, the majority of South Africans were disenfranchised and the majority of South Africans regarded apartheid law as illegitimate. In order to consciously establish new democratic institutions and a new democratic culture, the new decision-makers have had to take into account the social and political

divisions that exists within South African society. Thus, the transformation of the South African society necessitated inclusion and participation in political processes.

Luhmann, Lipset and Rawls offer rather uncritical accounts of a Western liberal democracy. Lipset's evaluative understanding of legitimacy, describes a seemingly well-balanced long standing liberal democracy. In his effort to explain legitimacy, he has depoliticised all institutions. Lipset's understanding of legitimacy reflects a society where democratic institutions are taken for granted and public indifference an indication of a healthy democracy.

Similarly, Rawls does not problematise the possibility of an underlying malaise caused by bureaucratisation, powerful interests, increasing specialisation and the apathy of the citizenry. Habermas and Rawls share many of the ideals of participation in political processes. However, Habermas does not readily accept a moral foundation of discursive procedure and the presupposed idea of a just society, which is something Rawls does.

As shown above, Habermas identifies problems in past and present theories. These theories also, in some cases, serve as an inspiration or a point of departure for Habermas. In this regard it must be mentioned that Habermas is indebted to Kant's dual perspective of law in society. However, Habermas takes into account the post-metaphysical character of contemporary society and accordingly creates a discursive paradigm of law-making. In Habermas' terminology, the Kantian "is" and "ought" have developed into the tension between facticity and validity. In Habermas' theory, the "is" is no longer subordinated to the "ought".

The apartheid system lacked all the essential characteristics of democracy. Its attempts to create a constitutional framework failed because democratic values, principles and mechanisms such as equality, political freedom and public participation were non-existent. The government lacked credibility and its constitution lacked authority. The new South African democratic order is not, or

perhaps not yet confronted by a post-industrial malaise.⁴⁹ Rather than "resuscitate" a democratic spirit, South Africa has had to create a culture based on healthy democratic principles.

In order to obtain legitimacy, the South African constitution-making process needed to be based on public participation. Without a sense of public ownership, the authority of the new constitution would have been jeopardised. Further, South Africa has had to build a constitutional consciousness, a human rights culture and a tradition of democratic-political participation in order to protect the new democratic institutions.

From the above discussion, it is evident that Habermas' approach offers the most useful and relevant analytical framework for understanding law-making processes in both established democracies and also in societies that are in the process of establishing democracy and the rule of law. In the next section, a detailed account of Habermas work will be presented and discussed.

2.4 Habermas' approach to legitimate lawmaking and democracy

As indicated above, Habermas' recent work advocates discursive law-making processes as the basis for a legitimate democracy. According to Habermas, legal legitimacy can only be achieved through a process of deliberation. Although his recent theory will be used as a theoretical framework for analysing the South African constitution-making process, a brief overview of his earlier thinking is important in order to understand his current theoretical position. His earlier work is a foundation and a link to, what Habermas now claims is the solution to achieving legitimacy in a modern state.

⁴⁹Both Habermas and Arendt believe that the political traditions of the public sphere have been lost in contemporary societies.

David Held, a political scientist has pointed out that Habermas' theory and his views of society cannot be described as a completed "programme". Rather, his theoretical contributions seems to be an ongoing project.⁵⁰ While Habermas' views have been described as being in the "process of development", he has retained what he believes are the important principles of a healthy society; namely the individual's need for self-development through an active discursive and deliberative model of radical democracy. Habermas' earlier work presents a bleaker picture of advanced capitalist society and its institutions. While Habermas remains critical of what he calls "instrumental reason", his recent work acknowledges to a larger degree the need for societal subsystems and the constitutional framework of the *Rechtsstaat*. His accommodation of liberalism does not necessarily contradict his earlier writings. Rather, the Habermasian conception of the *Rechtsstaat* is a practical or pragmatic continuation of his theory of radical democracy.⁵¹

Habermas' theory has its roots in the Frankfurt School. Founded in 1923, the Institute for Social Research (*Das Institut für Sozialforschung*) in Frankfurt was the home of this school of thought. Influenced and disturbed by political developments during the interwar years, including the rise of nationalism, the school sought to find a viable theoretical answer to the developments in Europe at the time. Marxist theory formed the basis for the work done by the members of the Frankfurt School. Although the Frankfurt School never represented a narrow homogenous programme, the ideas and the theories that flowed from its members have been collectively described as *critical theory*.

The objective of this school of thought was to move society towards rational institutions which would ensure a free and just life for everybody. The scholars of the Frankfurt School deployed interdisciplinary research in order to establish a

⁵⁰David Held: *Introduction to Critical Theory - Horkheimer to Habermas* (1980), p. 253.

⁵¹This will be explained later in this chapter.

practical solution to the alarming developments in Europe. The critical theorists believed that through an examination of contemporary social and political issues, they could contribute to the development of a non-authoritarian and non-bureaucratic society. According to the critical theorists, the process of liberation entailed a process of self-emancipation and self-creation. Although the Frankfurt School sought to reconcile theory and practice, its critics maintained that this was never achieved. They believed that the failure of the members of the Frankfurt School was due to the lofty, utopian nature of their work.⁵²

Due to the increasingly difficult political climate in the 1930s, the Institute for Social Research was forced to move to the United States. The Institute was only re-established in Frankfurt in 1953. In the post-war years, the Frankfurt School focused on the effects of contemporary mass-culture, authoritarianism, bureaucratisation and the failure of capitalism and the welfare state. The post-war critical theorists passionately criticised "instrumental reason" which, they believed, served to legitimise an irrational reality.⁵³

Max Horkheimer and Theodor Adorno were two of the schools leading exponents of critical theory. Horkheimer's work strove to situate theory and social research within a more radical historical and theoretical paradigm.⁵⁴ Horkheimer believed that social phenomena cannot be deduced from material being, i.e. the economy. He sought to substitute orthodox Marxism with a reconstructed understanding of Marx's project. Social theory should, according to Horkheimer, explain the interconnections through which society is able to transform its economy, culture and consciousness.⁵⁵ Horkheimer's model of critical theory deployed various scientific disciplines in order to describe the social totality, and

⁵²David Held: *Introduction to Critical Theory - Horkheimer to Habermas* (1980), p.25.

⁵³*ibid.* p. 39.

⁵⁴*ibid.* p. 32.

⁵⁵*ibid.* p.33.

to point out the contradictions that existed between the bourgeois ideals of justice, equality and freedom and the actual social reality.⁵⁶

While Horkheimer and Adorno shared similar views, Adorno's critique of society focused more on reification and fetishism, and how the dominant ideology penetrated culture. Adorno wanted to contribute to the establishment of "a critical social consciousness."⁵⁷ Adorno's concept of negative dialectics reflects what he perceived as the revelation of the "falseness of the claims of identity thinking".⁵⁸ For Adorno, a critical analysis of society implied an analysis and an understanding of the logic of philosophy itself.⁵⁹

While Habermas was never a member of the Frankfurt School, he is regarded as having been loosely affiliated to this school of thinking because of his contribution to critical theory. Habermas developed a continuation of critical theory. His project was to develop a critical theory in order to give practical substance to a society that he believed, needed transformation. While the founders of the Frankfurt School influenced Habermas' thinking, his own work reflects a departure from some of the original positions of Horkheimer and Adorno.

Habermas did not share the pessimism and the narrow theoretical-philosophical programme that characterised the Institute of Social Research after World War 2. Instead, he journeyed back to the roots of the Frankfurt School , the interwar years, where there had been a greater emphasis on the importance of empirical interdisciplinary social research.⁶⁰ Habermas shares Adorno's and Horkheimer's preoccupation with the Enlightenment and how this period developed "liberation into a new form of enslavement."⁶¹ His book *Structural*

⁵⁶ibid. p. 37.

⁵⁷Theodor Adorno: *Negative Dialectics* (1973), p. 323

⁵⁸ibid. pp. 147-147

⁵⁹ibid. p. 33.

⁶⁰William Outhwaite points out that *Dialectic of Enlightenment* by Adorno and Horkheimer which was published in 1947 reflects their scepticism of empirical social research. (See Outhwaite: *Habermas - A Critical Introduction* (1994), p. 6.)

⁶¹ibid. p. 6.

Transformation of the Public Sphere shows the importance he attaches to the emergence of the bourgeois public sphere in this particular historical period. This book, his first published work (1962), reflects to some degree Habermas' departure from the Frankfurt School. In this work, Habermas uses Kantian political philosophy extensively. He argues that the bourgeois public sphere achieved the establishment of a rational-critical debate. Habermas was criticised by Adorno and Horkheimer for taking an uncritical approach to Kant's philosophy. They also disapproved of his uncritical approach to "the illusions and dangerous tendencies of an Enlightenment conception of democratic public life."⁶²

Habermas describes the public sphere in 19th century Europe as a realm outside the state where discursive opinion-formation could take place. This public sphere was characterised by its principle of equality and its open and constraint-free environment.⁶³ The "reasoning" public was able to discuss freely and without the dogmatic appeal to authority and tradition. Habermas argued that the principles and the characteristics of the 19th century public sphere had been lost during the development of a post-industrial society which had become increasingly depoliticised and dominated by instrumental rationality. According to Habermas, technocratic manipulation and increasing bureaucratisation have led to the downfall of an active public life.⁶⁴

Habermas is critical of the increasing state intervention which is defined by the domination of instrumental reason and bureaucracy. This, he believes, led to the collapse of a public sphere in which politics is openly discussed by a reasoned public. The increasing interdependence of science, technology and industry, the increasing interdependence of state and society and the

⁶²Craig Calhoun: *Habermas and the Public Sphere* (1992), p. 4.

⁶³Jürgen Habermas: *The Structural Transformation of the Public Sphere* (1991), pp. 36-37.

⁶⁴*ibid.* p. 233.

commercialisation of the media has, according to Habermas, created new constellations of economics and politics.⁶⁵ Thus, in his book *Towards a Rational Society*, Habermas argues that politics is no longer a phenomenon of superstructure.⁶⁶ Knowledge in Habermas' view, is used as a tool to control objectified processes and to maintain communication. The legitimation of advanced capitalism has, according to Habermas, a technocratic character. Accordingly, the role of experts has become a central justifying mechanism.⁶⁷

In *Legitimation Crisis* Habermas offers a comprehensive examination of legitimacy in advanced capitalist society. According to Habermas, governments in capitalist societies maintain their legitimacy by creating an illusion of their separation from the economic structures of society. He argues that the crisis of legitimacy occurs because democratic procedures no longer provide an acceptable distribution of resources. This is why capitalist society has to create an illusion of reality.⁶⁸ This scenario, which he characterises as a "crisis", is based on a lack of confidence in a political system that has become increasingly interventionist, controlling more and more spheres of life. The expanding power and role of administrative structures lead to increasing complexity and a break-down of rationality. According to Habermas, the crisis of rationality in a capitalist state is characterised by the difficulty the government has in introducing policies that are acceptable by both business interests and labour interests. This, Habermas argues, will eventually weaken the legitimacy of the state.⁶⁹

Habermas categorises society into three subsystems; the economic, the politico-administrative and the sociocultural subsystem. Habermas argues that a

⁶⁵ibid. pp. 182-196.

⁶⁶Habermas: *Towards a Rational Society* (1971), p. 101.

⁶⁷ibid. p. 103.

⁶⁸Habermas: *Legitimation Crisis* (1976), pp. 21-23.

⁶⁹Similar views were advocated by James O'Connor (*The Fiscal Crisis*, (1973) and Claus Offe in "The Theory of the Capitalist State and the Problems of Policy Formation" in *Stress and Contradiction in Modern Capitalism* (1975)).

legitimation crisis will occur if any of these subsystems fail to contribute to the whole in the way that they are expected to.⁷⁰ A problem in the economic subsystem, for example, will impact on the politico-administrative subsystem and hence create a rationality crisis, which will ultimately lead to a legitimation and motivation crisis.⁷¹

Habermas' concept of democracy was and still is, proceduralist and discursive. Democracy has to facilitate participation in a way that will allow citizens to deliberate and make decisions without being prejudiced. In this way rational consensus can be reached.

The above mentioned discourse principle defines Habermas' ideal understanding of legitimacy: "Every effective belief in legitimacy is assumed to have an immanent relation to truth(...)that can be tested and criticised".⁷² In *Communication and the Evolution of Society* legitimacy is explained as "a political order's worthiness of being recognised".⁷³ This is based on validity claims, and the stability of domination has to depend on recognition. The justification of the system has to rely on what is accepted as reasonable in a given context.

In terms of this approach, legitimacy is ultimately based on reason. Habermas thus challenges the empiricist and normativist concept of legitimation by proposing a reconstructive concept of legitimation. Whereas the empiricist approach fails to take into account the "systemic weight of grounds of validity" and the normativist approach is too metaphysical, his reconstructive solution offers a new way of testing legitimacy - a justificatory system where validity claims compete.⁷⁴ The procedures and presuppositions are themselves the legitimating grounds on which the validity of legitimation is based.⁷⁵

⁷⁰Jürgen Habermas: *Legitimation Crisis* (1976), p. 49.

⁷¹ibid. p.45.

⁷²ibid. p. 45.

⁷³Jürgen Habermas: *Communication and the Evolution of society*(1979), p.178.

⁷⁴ibid. p. 204

⁷⁵ibid. p.185

Habermas' communicative action theory offers guidelines for avoiding a crisis of legitimacy. In his theory, he presents two concepts; life world and ideal speech. The life world is defined as a shared meaning that makes ordinary symbolic action possible. It is based on structural components such as institutions, normative structures and social practices. These components make social reproduction possible.⁷⁶ Habermas criticises the colonisation of the life world by the economy, the bureaucracy and the state.⁷⁷ In this context, Habermas introduces the concept of an ideal speech situation where people are able to communicate rationally on equal terms and without the prejudices of society.⁷⁸ Simone Chambers, a Canadian political scientist, has pointed out that the ideal speech situation could be interpreted as an evaluative standard rather than a practical solution.⁷⁹ In his latest work, Habermas rarely uses this concept.

Habermas' idea of a proceduralist and discursive alternative is still a major feature of his work. As mentioned above, in *Between Facts and Norms* his idea of a radical democracy has been replaced by a more practical approach where he attempts to locate the discursive principles of a radical democracy within a liberal framework. Habermas is attempting to reconstruct the traditional concept of the *Rechtsstaat*, a state embodying the rule of law. According to Habermas, the challenge of the modern constitutional democracy is how legal forms of state authority can be legitimate. *Between Facts and Norms* should be viewed as a continuation and development of some of the ideas in *The Structural Transformation of the Public Sphere* and *The Theory of Communicative Action*. In his latest work, Habermas is trying to find a practical alternative where public

⁷⁶Jürgen Habermas: *Theory of Communicative Action* (1987), Vol. 1, p. 82.

⁷⁷*ibid.* Vol. 2, pp. 230-231.

⁷⁸Habermas: *Communication and the Evolution of Society*, pp. 119-121.

⁷⁹Simone Chambers: *Reasonable Democracy* (1996), p. 172. In Habermas' most recent work, the term is hardly used. Thus it seems as he tries to distance himself from the concept and rather emphasise what is practically viable in an existing framework.

discussion can be an effective force of influence in public policy making. As the title indicates, he is attempting to synthesise two distinct approaches. He wants to base his theory on the complex realities of society without losing sight of the normative ideals. Habermas proposes a radical democracy in order to sustain a constitutional state which is set in a secularised political paradigm. This "radical Rechtsstaat" offers its citizens an equal opportunity to participate.⁸⁰ Habermas emphasises that his theory is not based on a form of self-governing socialism. The secularised or post-metaphysical character of the post-industrial society needs a constitutional and legal framework in order to establish common norms. Modern society cannot rely on traditional institutions such as religion. Thus, modern society has to look elsewhere in order to find a common set of norms. According to Habermas, law fulfils this function.⁸¹ However, the legitimacy of law relies on inclusive and participatory lawmaking processes. In this regard, civil society plays a vital role: "In my model, the weight of normative expectations is carried primarily by the forms of communication contained within civil society which itself arises out of a private sphere that remained intact, and by the flow of communicative processes in an active public sphere embedded in a liberal political culture."⁸²

In Habermas' earlier work, he viewed politics and the bureaucratic power of public administration as a "fortress" or a "siege-model", which the citizen would pressurise and influence. The theory presented in his latest work, can be understood as a sluice-gate model consisting of a centre and a periphery; which would facilitate a two-way communication flow between the public administration,

⁸⁰Michael Carlheden & René Gabriëls: "An Interview with Jürgen Habermas", *Theory, Culture and Society*, vol. 13, 1-4, 1996 (SAGE), p. 1

⁸¹In *Communicative Action*, Habermas regarded the emergence of modern law as a significant evolutionary step in modern practical evolutionary learning. However, Habermas also saw law as a vehicle for expanding administrative power, thus a tool for the modern capitalist state or the welfare state.

⁸²Michael Carlheden & René Gabriëls: "An Interview with Jürgen Habermas" (1996), p.2.

the parliament, the courts (centre) and the citizens (periphery). The participation that arises in this process, will legitimise the legal procedures that are used. "An element of democratic will-formation has to enter administration and the judiciary becomes answerable to a widening critique of legislating practice. In this respect, the sluice-gate model assumes a more comprehensive process of democratisation than the siege-model."⁸³

As indicated in the previous section, Habermas' recent project is to solve the tension between facticity and validity through discursive law making. This project can be understood as a reformulation of Kant's dual perspective of law. Contemporary society is highly differentiated and pluralised. It lacks the traditional and metaphysical homogeneity that characterised the emergent modern societies in the 18th and 19th century. Accordingly, Habermas sets out to find a way to make social co-ordination and integration possible in the complex reality of contemporary society.

For Habermas, society is characterised by both an internal and an external tension between facticity and validity. The internal tension can be found in the legal medium itself. The facticity of legal norms can be understood as the legal coercion that is implicit in the enforcement of law. The validity of law depends on the legitimacy of law and accordingly, the legal claim to general recognition by the addressees. On the other hand, Habermas' concept of the external tension between facticity and validity can be located between the normative claims of constitutional democracies and the social facticity of their actual functioning.⁸⁴ Legally uncontrolled power penetrates law from the outside which would mean that law can be negated by social facticity. Habermas argues that the social facticity is "illegitimate insofar as it instrumentalizes law."⁸⁵ Legitimate lawmaking processes should be kept free from the illegitimate interventions of

⁸³ibid. p.4.

⁸⁴Jürgen Habermas: *Between Facts and Norms* (1997), p. 82.

⁸⁵ibid. p. 137.

social power. Habermas defines social power as "the factual strength of privileged interests."⁸⁶ Accordingly, the external relation between facticity and validity is explained as "the tension between the normative self-understanding of the constitutional state as explained in discourse-theoretical terms, and the social facticity of the political process that run their course along more or less constitutional lines."⁸⁷ This tension is a consequence of social interests and powerful organisations attempt to instrumentalise political processes for strategic purposes. The external tension also emerges in the empirical reality of administrative structures. In this regard, the apparent functional complexity of contemporary societies takes administrative measures that is guided by experts. In other words, the external tension between facticity and validity can be seen as a tension between norms and reality.

The tension between facticity and validity is a continuation of Habermas' critical analysis of the societal subsystems in contemporary society. However, the objective of Habermas' recent radical-democratic project is not the democratisation of the subsystems. Rather, he proposes an indirect steering of them through the medium of law. It is in this context that the broader public sphere must be part of the opinion-and will-formation in the formulation of new law.

By focusing on the tension between facticity and validity Habermas does not simply accept the normal political procedures of a contemporary liberal culture. Habermas applies law as a medium to solve this tension. He maintains that law, through the communicative reason found in a discursive opinion-and will-formation, can attain legitimacy. The inherent coercion found in law has to be justified through legitimate validity claims. In order to create a sustainable legitimate democracy, facticity and validity must intertwine and establish a

⁸⁶ibid. p.150.

⁸⁷ibid. p. 288.

sustainable democratic and legitimate order. According to Habermas, communicative freedom and communicative power is the core of such a discursive process. Validity claims rely on communicative action as a mechanism to justify societal institutions such as law. In this regard it is important to note that Habermas emphasises the necessity of validity claims in the *genesis* of legitimate law. The communicative action provides a tool which enables people to be part of the law-making process.⁸⁸ The tension between facticity and validity is solved through social integration and communicative action. The institutional structures of society are dependent on a normative acceptance of these structures. Thus, through discursive processes, citizens will assist in formulating a framework of societal institutions that are accepted, recognised and understood by everyone.

As shown above, Habermas argues that in a highly institutionalised, differentiated and secularised society, the process of lawmaking can create a legitimate democracy. It is essential, however, that the process is based on deliberation. The citizens must come to recognise and respect the rights embedded in the laws. The law must also preserve the connection with the socially integrative forces of communicative action.⁸⁹ The legitimacy of lawmaking is thus dependent on the level of participation in the process. "The exercise of public authority is oriented and legitimated by the laws citizens give themselves in a discursively structured opinion-and will-formation".⁹⁰ Only those laws which meet with the agreement of all citizens in a discursive law-making process that is itself legally instituted, may claim legitimacy. The consequence of this democratic procedure is legal validity which in turn is the basis for legitimacy. The legitimate laws of society have the "power" of respect; and the citizens' "obedience" is therefore assured. Because of the coercive implication of law, it needs to be founded on a justificatory lawmaking process that is based on rationality. In

⁸⁸ibid. pp. 25-34.

⁸⁹ibid. pp. 118-130

⁹⁰ibid. p. 170.

Habermas' theory, law becomes the central structure in society; it is the only means with which to create solidarity in a complex web of social relationships. Thus democracy and the rule of law are internally related. Law needs social recognition in order to exist as a set of coercible rules and impersonal procedures, which in turn must be accepted by citizens on a rational basis.⁹¹ Through discursive lawmaking processes, the tension between facticity and validity will be solved.

Habermas emphasises the need for inclusion, regardless of what position a citizen holds in society. The process, according to Habermas, must not be restricted to the better informed, or to citizens holding more powerful positions. He argues that the real power in deliberation is through public communication - all members of society must have the opportunity to participate in the discourse.⁹²

Habermas believes that the specialised codes found in the life world, make it difficult for the ordinary citizen to participate. This expert culture risks making democracy into an "expertocracy", where decision-making is dominated by and based on the knowledge of experts. According to Habermas, this would also result in a drying-out of communicative practices. The languages found in the subsystems, need to be translated into ordinary language. This opens the system up for inputs from the public. "There are no issues, however specialised, of political relevance that could not be formulated in such a way that the alternatives discussed by experts could be followed by a wider public. In a democracy, there can be no political privilege based on expertise."⁹³

As mentioned above, the role of civil society in the democratic process is critical. Habermas defines civil society as "voluntary associations and coalitions separate from the state and the economy that secure the communicative

⁹¹ibid. p. 448.

⁹²ibid. p. 305.

⁹³Mikael Carlheden & René Gabriëls:"An Interview with Jürgen Habermas", 1996), p.6.

dimension of the life world".⁹⁴ Habermas separates the public sphere into output-oriented clientele and input-oriented suppliers. Whereas the first group is defined as private organisations, business organisations, labour unions, the latter group is defined as a public interest group. According to Habermas, the public interest organisations formulates social problems, make broad demands and articulate public interests or needs and "attempts to influence the political process more from normative points of views than from the standpoint of particular interests."⁹⁵ This group appears to form Habermas' definition of civil society. According to Habermas, the institutional core of civil society comprises non-governmental and non-economic associations found in the public sphere.⁹⁶ Civil society raises the concerns and problems found in the private sphere and brings these into the public sphere where civil society can actively deal with them in an interaction with the institutionalised centre. In this way, civil society acts as a communicative link between the private sphere and the state.

Habermas acknowledges that civil society needs a specific set of capabilities in order to make an impact. Organisations must have the capacity to identify and "thematize latent problems of social integration."⁹⁷ Civil society must then introduce these via parliamentary or judicial "sluices". Habermas also acknowledges that groups, persons or experts who have acquired a position of influence in the public sphere are "furnished with unequal opportunity for exerting influence."⁹⁸ However, he emphasises that the political influence that these actors gain through public communication, must ultimately rest on the "resonance and indeed approval of a lay public whose composition is egalitarian."⁹⁹

⁹⁴ibid. p. 7.

⁹⁵Jürgen Habermas: *Between Facts and Norms* (1997), p. 355.

⁹⁶ibid. p. 366.

⁹⁷ibid. p.358.

⁹⁸ibid. pp. 363-364.

⁹⁹ibid. p.363.

As mentioned above, in Habermas' latest theory, he has modified his critical stance on subsystems. He has come to recognise the fact that there is a need for subsystems such as legal administration. He says that the subsystems are specialised "for collectively binding decisions".¹⁰⁰ However, in a legitimate democratic order, these subsystems cannot carry out their functions without the influence of the public sphere, and particularly the civil society. This extensive public sphere stimulates public opinion and uses communicative power to assist and influence the subsystems.¹⁰¹ The decision-making bodies of the state are accountable to the public sphere, and have to take the influence or pressure from the public sphere seriously in order to be legitimate. Hence, the public sphere becomes the "watch dog" of society.

Habermas' two-track model seems to indicate that he does not believe that rational consensus in decision-making processes can be reached by all citizens. His definitions of "weak" and "strong"¹⁰² publics, or periphery and centre reflect this position. Kenneth Baynes, a professor of philosophy argues that Habermas' two-track model creates a division of labour between the centre and the periphery. The private associations of civil society in the periphery are responsible for identifying and interpreting social problems in society. The formal institutions of the centre such as parliament have decision-making responsibilities.¹⁰³ According to Baynes, Habermas does not attempt to propose a concrete explanation of how mediation between the centre and the periphery can

¹⁰⁰Jürgen Habermas: "Three Normative Models of Democracy", *Constellations*, 1994 p.9.

¹⁰¹*ibid.* p.9.

¹⁰²The concept of a "weak" and a "strong" public was introduced by Nancy Fraser in her discussion of Habermas' public sphere in her article "Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy" in *Habermas and the Public Sphere* (ed. Craig Calhoun, 1992), pp. 132-136.

¹⁰³Kenneth Baynes: "Democracy and the Rechtstaat. Habermas's Faktizität und Geltung" in *The Cambridge Companion to Habermas* (ed. Stephen White, 1995), pp. 216-217.

be executed practically. The normative theory of Habermas depends on "empirical findings of complex comparative studies".

James Bohman, an American philosopher, points out that Habermas bases his theory on rational reconstruction by combining normative and empirical analyses of social practices.¹⁰⁴ Habermas is able to see the development of law as representing a social learning process in the direction of the increasing autonomy and complexity of law in modernity. Bohman also interprets Habermas' concept of legitimacy of the state as a reflection of, and depending on, the level of democratic deliberative procedure. Bohman describes the basis of Habermas' procedural understanding as a rational communication where the participants are able to reach *consensus* on the issues at stake. While agreeing with his overall view of participation in a democratic society, Bohman is sceptical of Habermas' somewhat optimistic notions regarding "unanimous agreement" in the democratic processes. According to Bohman, this is practically impossible. He deals with this political problem by what he calls a *reformulation* of Habermas' principle: "A law is legitimate if it is agreed to in a participatory process that is fair and open to all citizens".¹⁰⁵

However, as pointed out by Baynes above, it can be argued that Habermas does not believe that absolute consensus is realistically achievable in a political decision-making process. Habermas seems to have abandoned his ideal philosophical framework and replaced it with a practical solution that can be used in *real* democracies. As the title of his book indicates, the objective of Habermas' new project is to solve the tension that exists between facts and norms.¹⁰⁶ The importance of the public sphere, communicative action and legitimacy of

¹⁰⁴James Bohman: "Complexity, Pluralism, and the Constitutional State", *Law and Society Review*, 1994, p. 912.

¹⁰⁵*ibid.* p. 922.

¹⁰⁶In his article, Bohman does recognise Habermas' attempt to find a practical solution to the tension that exists between facts and norms. He believes however, that his stance on unanimous agreement is paradoxical and "runs counter to the general orientation of the book" (p.921).

democratic procedures is based on the *opportunity* that they afford for participation, according to Habermas: "The struggles for recognition in a democratic state are legitimate only to the extent to which all groups are given access to the political public sphere, to speak out and to articulate their needs, and to the extent that nobody is marginalised or excluded."¹⁰⁷ This indicates that Habermas' emphasis rests on participation and inclusivity, rather than on a utopian consensus among all citizens. In fact, Habermas points out the existence of an ironic dialectic between legitimation and the risk of dissensus. Where communication and public discourse are deployed in legitimating a process, there will always be potential disagreement with regard to some of the issues.¹⁰⁸ The process, however, has to be facilitated in such a way that the credibility and transparency of the process can also accommodate dissensus. In other words, the process itself becomes an important mechanism in legitimating the outcome.

William Outhwaite, a sociology professor, points out that Habermas principally rejects the notion that legal and political decisions should be left to experts. This, according to Outhwaite, does not mean that Habermas is advocating a radical anarchist view which would imply that everyone affected by legal and political decisions should discuss them until complete agreement is reached. Outhwaite maintains that in Habermas' most recent work, he emphasises the impracticability of such a position. Thus, "he (Habermas) now makes it clear that he accepts something like the existing institutional framework of law and representative democracy (...) while insisting that the appropriateness of such arrangement, the fairness of conventions, and so forth, should be open to, and determined by the widest possible discussion".¹⁰⁹

¹⁰⁷Mikael Carlheden & René Gabrëls: "An Interview with Jürgen Habermas", (1996), p. 12.

¹⁰⁸Jürgen Habermas: *Between Facts and Norms* (1997), p. 462.

¹⁰⁹William Outhwaite: *The Habermas Reader* (1996), pp. 6-7.

How can Habermas' theory provide an understanding of the South African constitution-making process? Habermas provides a theoretical framework in which the actual constitution-making process can be situated. His theory highlights the importance of inclusivity and participation as legitimisation mechanisms in a lawmaking process. Habermas' understanding of the complexities of society and the importance of developing a legitimate sustainable democratic order, establishes the basis for an analysis of the inclusive nature of the constitution-making process in South Africa.

At the time of the constitution-making process, South African society was the unmitigated product of its apartheid history. The apartheid system created both political and socio-economic imbalances and left South Africa's multi-cultural and multi-ethnic society deeply polarised. In order to rectify the past and create a legitimate future, a process where South Africans were included at all levels was essential. Although the South African experience is different from the well-established democracies that Habermas describes, the tools for establishing legitimacy remain the same: The public must be able to have access to decision-making bodies. Processes where an expert-élite have all the power will alienate the public and create an atmosphere of distrust and suspicion.

Habermas' theory is comprehensive, detailed and far-ranging in terms of the issues that he addresses. The core of his recent theory, is the importance he attaches to civil society and the interaction and communicative action between the periphery and the centre in order to legitimise lawmaking processes. This is why his theory has relevance for the PPP of the CA. Habermas' above-mentioned concepts of communicative action and discursive law-making processes provide this study with a theoretical understanding for democratic legitimacy.

A participatory process where everybody can be involved in creating a product, i.e. a law, has to be meaningful to the citizens themselves.

"From the standpoint of legal theory, the modern legal order can draw its legitimacy only from the idea of self-determination: citizens should always be able to understand themselves also as authors of the law to which they are subject as addressees."¹¹⁰

According to Habermas, the only way constitutional legitimacy can be secured is through law, and the only way law will reflect legitimacy is through a process of deliberation. As mentioned above, Habermas sees an internal relationship between law and democracy, and one will not work without the other.¹¹¹ In drawing attention to the problems faced by established constitutional democracies, Habermas provides guidelines for emerging democracies such as South Africa: South Africa needs a democratic culture where the public expects to be consulted in lawmaking processes, and where the public understand and "own" the laws that govern them. These mechanisms will create a healthy and sustainable environment for democracy. It is therefore particularly important for a new democracy such as South Africa, to legitimise the drafting of its constitution by enabling citizens to participate in the process. This also sets a precedent for subsequent lawmaking processes. "The proceduralist understanding of law thus privileges the communicative presuppositions and procedural conditions of opinion- and will-formation as the sole source of legitimation".¹¹² According to Habermas, only processes where those who are affected are able to participate can claim legitimacy.¹¹³

2.5 Concluding remarks

In Habermas' latest work, he "compensates" for the practical deficits of the idealisations of his previous theory by going in the direction of a more "realistic"

¹¹⁰Jürgen Habermas: *Between Facts and Norms* (1997), p.449.

¹¹¹ibid. p. 449.

¹¹²ibid. p.450.

¹¹³ibid. p.458.

theory of social institutions, one which makes democracy fit the conditions of social complexities. As shown above, his project is to solve the tension between facticity and validity through discursive lawmaking. Habermas argues that his model of discursive lawmaking is the only way of creating democratic legitimacy in countries that are increasingly differentiated and pluralised. His point of departure for dealing with these challenges, is an established democracy. South Africa, characterised by multi-ethnicity, deep political divisions and glaring socio-economic contrasts in many ways presents a more problematic point of departure than that of established democracies in the Western world. However, it can be argued that the South African constitution-making process, provide the setting for understanding the importance of Habermas' theory and for applying his discursive model in a practical context. Habermas' grasp of the tension that exists in modern law, and his corresponding discursive law-making theory, provide the South African constitution-making process with a theoretical basis for understanding the importance of the legal medium itself and the importance of discursive processes in a complex society. His theory establishes the need for participation in law making processes. In fact, it could be even said that the South African historical context makes this approach virtually mandatory. It is important to note that Habermas applies his criteria to lawmaking processes in an existing constitutional democracy. In other words, his theory does not explicitly deal with constitution-making. Does this imply that his theory is irrelevant or unapplicable to the South African constitution-making process? Chambers, in her study of the Canadian constitution-making process, points out that Habermas is particularly important in relation to fundamental "questions", such as constitutional principles, because these are the very basis of other lawmaking processes and indeed democracy itself.¹¹⁴

¹¹⁴Simone Chambers in *The Cambridge Companion to Habermas* (1995), p. 255.

The PPP can be "tested" both normatively and empirically. In this regard, two questions must be asked. Did the CA, when developing the PPP take into account Habermas' normative understanding of the tension between facticity and validity? Did the CA apply Habermas' criteria for a discursive lawmaking process in the implementation of the PPP? The legitimacy of the programme is therefore determined by the objectives of the CA, the implementation of the PPP and whether the CA took the complex political and social reality of South Africa into account.

3. TOWARDS DEMOCRACY: A BACKGROUND TO THE CONSTITUTION-MAKING PROCESS

3.1 Introduction

In order to understand the constitution-making process, it is a necessary to understand the historical context in which the process took place. This chapter will serve as a background to the implementation of the PPP. A brief description of the illegitimacy of apartheid law and the extra-parliamentary reaction to the apartheid system will be provided. This is important with regard to the concepts of facticity and validity in the apartheid legal system. The exclusion of the majority of the population, from lawmaking processes created an "illegal" opinion formation outside the institutionalised structures. The dynamics between the institutionalised apartheid system and the resistance to apartheid, displays the tension between the facticity and validity of law in South Africa at that time. This provides an understanding as to why the post-apartheid order needed to be particularly aware of this tension when establishing democracy and the rule of law. It is important to note that this is a brief historical overview - the purpose of this overview is not to give a detailed account of every aspect of the apartheid system or provide all the nuances in the developments that led to South Africa's transition to democracy.

The last part of this chapter deals with the CA. The political and administrative structures of the CA will be outlined and the motivation, objectives and strategies behind the participation programme will be explained. This overview will provide an indication of whether the CA's normative understanding of the PPP can meet with Habermas theoretical criteria.

3.2 The lawlessness of apartheid law

The South African constitutions of 1910, 1961 and 1983 were characterised by racial exclusivity, the absence of a justiciable bill of rights, a lack of separation of powers and the supremacy of Parliament.¹¹⁵

These constitutions enabled the implementation, the enforcement and the protection of the apartheid system. Parliament was supreme and the judiciary was only able to deal with procedural issues. Jeremy Sarkin, a South African law professor, observes that "one effect of parliamentary supremacy was that the judges were cast as mere technicians who could mitigate the effects of unjust laws only on procedural and technical grounds."¹¹⁶ Accordingly, they were only able to interpret the law and review the procedures when examining rights issues. This allowed the government to make laws that subjected the majority of South Africans to a complete and all-encompassing system of racial discrimination that impacted upon every aspect of their lives.

The apartheid laws did not only discriminate against, and exclude the black population. The government also had to introduce repressive security laws in an effort to curb the increasing resistance to the state. Discrimination caused opposition, which resulted in repressive measures, which in turn intensified opposition. The government would then reply with even more repressive measures. The government created an environment of complete lawlessness where officials could undertake any action, however violent in the name of law and order and the maintenance of stability. In the 1950's, the ANC and later the PAC, organised opposition to the introduction and implementation of apartheid

¹¹⁵Jeremy Sarkin: "The role of the 1996 South African Constitution in promoting a human rights culture", website on internet: www.legalcity.co.za

¹¹⁶Jeremy Sarkin: "The development of a human rights culture in South Africa", published in Human Rights Quarterly 1998 and released on internet: www.legalcity.co.za.

legislation. An example of this opposition was the Defiance Campaign of 1951-52.¹¹⁷

The Defiance Campaign did not stop the government from implementing apartheid law. Instead, the government made new security laws that were intended to prevent other campaigns of a similar nature. The Public Safety Act of 1953 gave the president the power to institute emergency rule to maintain public order. In terms of this emergency legislation, the president had the power to issue regulations that he felt were necessary in order to maintain public order.¹¹⁸ The Public Safety Act also made provisions for detention without trial.¹¹⁹ Although it was intended as an emergency measure, it soon became a permanent feature of South African law enforcement. In 1963, the ninety-day detention law was passed, and five years later the Terrorism Act gave the police a free hand to keep anybody suspected of terrorist activities in solitary confinement.

The Government continued to pass security legislation in order to suppress the increasing anti-apartheid activities. The Criminal Law Amendment Act was passed the same year as the Public Safety Act, and together these two Acts were meant to prevent any campaigns against unjust laws.¹²⁰ Protest against or contravention of, any apartheid laws entailed severe punishment. The Riotous Assemblies Act of 1974, gave the authorities the power to prohibit gatherings. In the early 1980's the repressive security laws were consolidated - the Internal Security Act and the Protection of Information Act made it impossible for anybody to oppose the Government without being persecuted.

For many victims of these unjust laws, the laws themselves only intensified their desire and their struggle to overthrow the government. Advocate Gilbert

¹¹⁷Tom Lodge: *Black Politics in South Africa since 1945* (1983), p. 43.

¹¹⁸A State of Emergency was declared for the first time in 1960 after the Sharperville massacre. 11,503 persons were detained under the emergency rule which lasted for 156 days.

¹¹⁹John Dugard et al.: *The Last Years of Apartheid* (1992), pp. 32-33.

¹²⁰*ibid.* p. 34.

Marcus, a former law professor, notes that "in a society already characterised by extreme authoritarian control, the successive states of emergencies contributed significantly to an ethos of lawlessness(...)an already fragile legal system came to be perceived by many South Africans as both impotent and partial..".¹²¹

Violence, torture and massive human rights violations were used to curb the opposition. The recent Truth and Reconciliation Commission (TRC) disclosures, confirm this state of affairs.¹²² The TRC also shows that the opposition turned to increasingly violent means as a response to the increasingly repressive laws.¹²³ The banning of both the ANC and the PAC in 1961 led to the formation of Umkhonto we Sizwe and Poqo, the underground military wings of the ANC and the PAC.¹²⁴

During the mid-1970s, the opposition to apartheid intensified. Schools, trade unions, churches, civic-and community organisations and other extra-parliamentary organisations took part in various types of boycotts and strikes. South African historian Tom Lodge observes: "The resistance of the 1970's provides a startling contrast in terms of scale and duration to the movements of the 1950's and 1960's. This has reflected a fundamental crisis in South African society."¹²⁵

Paulus Zulu, a researcher in South African black politics, notes that "resistance implies a lack of legitimacy in the legal system and the actors engaged in resistance flourish through this illegitimacy rather than through the approval of the legal system".¹²⁶ From the authorities' point of view, the resistance was

¹²¹ibid. pp. 53-54.

¹²²Truth and Reconciliation Commission of South Africa Report 1998, Vol. 2, pp. 160-324.

¹²³ibid. pp. 325-400.

¹²⁴ibid. pp. 326 and p. 367.

¹²⁵Tom Lodge: *Black Politics in South Africa since 1945* (1983), p. 321.

¹²⁶Paulus Zulu: "The Politics of Internal Resistance Groupings" in *A Future South Africa. Visions, Strategies and Realities* (eds. Peter L. Berger and Bobby Godsell, 1988), p. 144.

illegal. The "legality" on which the political order was based, was seen as a pretext for continuing the oppression of the majority of South Africans. Susan Booysen, a lecturer in political studies, argues that while protecting a small privileged group, the legal system criminalised political activity and "delegitimised" the resistance of the apartheid state in the eyes of the law.¹²⁷

Booyesen also points out that "political legitimacy serves as a crucial indicator of the ability to govern. Without it, the stability of most political orders is in doubt. Substitutes for legitimacy can nevertheless facilitate a continuation of the state's hegemony; among these "force and coercion would rank foremost".¹²⁸ The South African authorities had to increasingly use force to be able to create an illusion of stability. Thus, the "ungovernable" masses were faced with heavy restrictions. This may, according to Booysen, in the short term, lead to the inhibition and paralysis of the resistance movement. If the movement is powerful enough, the long term effect is increased political consciousness amongst those who are oppressed. The politicised masses feed the legitimacy crisis by their actions. Booysen maintains that the power of the grassroots is therefore essential in effecting political change.

The establishment of the UDF in 1983 consolidated resistance politics. In 1986 Tom Lodge wrote that "the roots of the UDF movement have now penetrated certain communities too profoundly for its influence to be eradicated by police coercion..".¹²⁹ Faced with these problems, the government attempted to initiate reforms. These reforms however, were conditional and no real attempt was made to legitimise the political and economic order of society as a whole. Booysen

¹²⁷Susan Booysen: "Legitimacy and Pseudo-Legitimacy: The crisis of the South African State" (1988), p. 10.

¹²⁸ibid. p. 1.

¹²⁹Tom Lodge: "The Politics of Refusal" in *Leadership South Africa*, Vol. 5 (1), 1986, p. 23.

suggests that the only effect the reforms had, was to remind the mass movement of the illegitimacy of the state.¹³⁰

Habermas understands civil disobedience as an expression of the citizens desire to "overcome in practice the tension between social facticity and validity."¹³¹ In this regard the citizens are seen to actively engage in realising a "system of rights."

"Civil disobedience manifests the self-consciousness of a civil society confident that at least in a crisis, it can increase the pressure of a mobilized public on the political system to the point where the latter switches into the conflict mode and neutralizes the unofficial countercirculation of power."¹³²

In South Africa, civil disobedience was an attempt to establish a link between civil and political society and to appeal to fundamental principles of rights and democratic legitimacy. In Habermas' terminology, this is expressed as "an implicit appeal to connect organized political will formation with the communicative process of the public sphere."¹³³ Because of the illegitimacy of apartheid law, the tension between social facticity and validity was particularly acute. Accordingly, the only means by which to exert influence was through "civil disobedience". The character of apartheid society made it impossible to solve the internal tension between facticity and validity - the tension between the positivity and the legitimacy of law. As we shall see in the next sections, the momentum of public opinion formation in the South African public sphere, made it increasingly difficult for the political system to continue to uphold the political order. This process eventually culminated in negotiations which set the scene for the transition to a new political order.

¹³⁰Susan Booysen: "Legitimacy and Pseudo-Legitimacy: The Crisis of the South African State" (1988), pp. 12-14.

¹³¹Jürgen Habermas: *Between Facts and Norms* (1997), p. 384

¹³²ibid. pp. 383-384.

¹³³ibid. p.384.

3.3 The last decade of apartheid

From the mid-1980's, the government relied increasingly on emergency legislation in its effort to maintain control of the country. The emergency regulations led to the detention of thousands of people and the security forces were indemnified against both civil and criminal liability. In addition to this, censorship, prohibition of gatherings and restrictions on individuals and organisations were all part of the day-to-day reality of South Africa.¹³⁴

The 1983 constitution was a turning point for the anti-apartheid movement. The drafting of this constitution was an attempt by the government to appear to be reform-friendly. The co-optive strategy failed. According to Hassen Ebrahim, author of *The Soul of a Nation*, the 1983 constitution was a manifestation of a shift in NP thinking. "While maintaining the apartheid project, the NP had begun to focus more closely on other cleavages that could be exploited within the black community."¹³⁵ The 1983 constitution became a symbol of apartheid and white supremacy. The Republic of South Africa Constitution Act of 1983 established three separate chambers, the House of Assembly for whites, the House of Representatives for coloureds and the House of Delegates for Indians. The 1983 constitution was structured in such a way that the apartheid system could be perpetuated. This constitutional system excluded the majority of the population and entrenched a racial hierarchy. The elections for the tri-cameral parliament which were held in 1984 confirmed the lack of support amongst coloured and Indian communities for the 1983 constitution. Only 17.1 % of all eligible coloured voters and 16.01 % of all eligible Indian voters, participated in the election.¹³⁶

¹³⁴John Dugard et al.:*The Last Years of Apartheid: Civil Liberties in South Africa* (1992), pp. 39-45.

¹³⁵Hassen Ebrahim: *The Soul of a Nation: Constitution Making in South Africa* (1998), p. 18.

¹³⁶John Dugard et al.:*The Last Years of Apartheid: Civil Liberties in South Africa* (1992), pp. 8-9.

The tri-cameral parliament provoked very intense opposition, and movements such as the United Democratic Front (UDF) were established as a direct response to the 1983 constitution. One of the reasons why the UDF became such a powerful movement was its affiliation to a wide variety of civil society structures. Civic, religious, student, professional, worker, business and community organisations were allied to the UDF. By 1987 more than 600 groups and organisations were affiliated to the UDF.¹³⁷ By 1984 armed action had risen to 50 operations per year. From 1986 onwards, the number of attacks increased to between 250 to 300 per year.¹³⁸

Ebrahim describes the new approach of the Botha regime as a "dual strategy"¹³⁹ - a strategy based on reform and repression. Botha wanted to retain political control and continue the separation of the races. However, the tri-cameral experiment, as mentioned above only increased the resistance to the regime. Botha's last attempt to "reform" the political landscape, without losing power, came in 1988 when he introduced a new constitutional framework which would "enable black people to be co-opted in the processes as far as the cabinet".¹⁴⁰ His reform proposal failed to obtain support from black South Africans and he continued to maintain an inflexible stance towards real reforms. In 1988 F.W. De Klerk replaced him as the leader of the NP, and in 1989 De Klerk became the State President of South Africa.

Although secret talks and negotiations between the government and the banned anti-apartheid organisations began around 1985, it was only with the change of leadership in the NP that any serious prospect of a new democratic constitutional dispensation began to emerge. Intense and growing pressure, both

¹³⁷Paulus Zulu: "The Politics of Internal Resistance Groupings" (eds. Berger and Godsell, 1988): *A Future South Africa: Visions. Strategies and Realities*, p. 135.

¹³⁸Ebrahim: *The Soul of a Nation, Constitution-making in South Africa* (1998), p. 19.

¹³⁹ibid. p. 18.

¹⁴⁰ibid. p. 20.

from abroad and from groups within the country left the NP with little choice. The election in 1989 was a landslide victory for De Klerk and he interpreted this as a mandate from the white community to undertake political reform. The demand for constitutional negotiations intensified.¹⁴¹

In August 1989 the ANC successfully lobbied other African countries to adopt the Harare Declaration.¹⁴² The declaration contained a set of principles that would aim to establish a basis for South Africa's transition to democracy. The purpose of the document was to provide guidelines for a negotiated settlement. The declaration mentioned among other things, the need to "repeal the repressive apartheid legislation", the unbanning of restricted organisations and the release of political prisoners and detainees in order to create a climate that was conducive to the negotiation of a constitutional settlement.¹⁴³

3.4 1990-1994: A Prelude to Democracy

1990 was the beginning of a new decade and a new South Africa. Nelson Mandela had been released from prison and the liberation movements had been unbanned. Although the ANC and the NP had already started negotiating in the mid -1980s, real talks could only commence once the liberation movements were unbanned and political leaders were released from prison or returned from exile.

In May 1990 a formalised constitutional process started. This has become known as the "Groote Schuur Minute".¹⁴⁴ In the "talks about talks" the NP and the ANC agreed amongst other things, to a commitment to a process of negotiations. In the next 18 months the negotiating parties met to discuss issues and to try to

¹⁴¹ibid. p. 24.

¹⁴²ibid. p. 35. The "Harare Declaration" derived its name from the Organisation of African Unity (OAU) conference which took place in Harare in August 1989. OAU drafted the document.

¹⁴³ibid. p.35, pp.451-455.

¹⁴⁴ibid. p.659.

establish a foundation where "real" negotiations could take place. In December 1991 the Convention for a Democratic South Africa (CODESA) held its first session at Kempton Park.¹⁴⁵ This was a multi-party convention and twenty parties and organisations participated in the process.¹⁴⁶ The objective of CODESA was to discuss and agree upon a set of interim constitutional principles that would guide South Africa through its first democratic election.

The CODESA negotiations did not have a smooth passage. The second Kempton Park session in 1992 broke down due to disagreement over contentious issues such as federalism, the status of the Interim Constitution and the composition and the role of the Senate.¹⁴⁷ The third and last session only resumed in April 1993 after rolling mass action and escalating political violence. This session was called the Multiparty Negotiating Process. Despite disagreement about various contentious issues and another "walk-out"¹⁴⁸ the Interim Constitution was ratified on 18 November 1993.

The Interim Constitution, the product of the Kempton Park negotiating process is regarded by many as a "truce" or a "peace treaty".¹⁴⁹ Many constitutional compromises had to be made in the name of political stability.¹⁵⁰ Schedule 4 of the Interim Constitution outlined 34 constitutional principles, which

¹⁴⁵The CODESA negotiations were also known as the Kempton Park Negotiations.

¹⁴⁶The number of parties and organisations that took part fluctuated in the years ahead as many walked out in protest during the heated negotiations (Ebrahim: *The Soul of a Nation*, p. 661)

¹⁴⁷Siri Gloppen: *South Africa: The Battle over the Constitution* (1997), p. 201.

¹⁴⁸The Inkatha Freedom Party (IFP) and the Conservative Party (CP) became part of a conservative alliance called COSAG (Concerned South Africans Group) dissatisfied with the lack of emphasis on federalism and decided to walk out of the negotiations (Gloppen, p. 201).

¹⁴⁹*ibid.* p. 199. One of the CASE surveys reflects a similar sentiment among the CA staff (CASE Report: "Public Participation Evaluation", p. 2-3). The CA's motivation for a participatory approach can at least partly be explained by this attitude. See section 3.8.

¹⁵⁰As Siri Gloppen points out, the four year long process saw many ideological clashes. However, the end-product reflected the many concessions and compromises that had been made during the Kempton Park negotiations (Gloppen, p. 205).

included provisions for democratic, constitutional government with general elections, universal suffrage, provincial powers and the separation of powers between the legislature, executive and judiciary. The principles also contained a commitment to basic human rights such as equality before the law, non-discrimination and affirmative action. The Interim Constitution also established a system for governing the country under a government of national unity. Finally, the constitutional principles were intended to serve as a framework for the drafting of the final constitution after the 1994 election.

Four years full of political brinkmanship and deal brokering had passed. It was evident that this negotiation process lacked authority, transparency and democratic procedures - the criteria for legitimacy.¹⁵¹ Joe Slovo, a representative of the SACP at the negotiations, replied to the general criticism of CODESA's lack of transparency: "We are perceived as a mystical cabal...we would like to believe the future of all our people is being discussed. They have a right to know what is being discussed."¹⁵² The multi-party negotiations at Kempton Park took place mostly behind closed doors by what appeared to be a largely unmandated élite. There was no objective way of assessing whether a particular organisation represented the constituency it claimed to represent or whether it had a mandate from that constituency. Organisations such as the Congress of South African Trade Unions (COSATU) and civic associations, were "indirectly represented" by the ANC.¹⁵³ This meant that a fairly wide range of organisations were not party to the settlement agreement. However, it appeared to be the only available option at that time. The country needed a set of guidelines and a constitutional framework for holding the first democratic election in South Africa's history. In terms of the Interim Constitution, the final constitution would be drafted by the CA. After the

¹⁵¹ibid. p. 256.

¹⁵²*Citizen*: "Open all Codesa talks to journalists: Slovo", 2 June 1992.

¹⁵³The ANC was increasingly dependent on the ANC-aligned civic associations and COSATU who made extensive use of mass action to pressurise the government. (Marina Ottaway: *South Africa: The Struggle for a new Order* (1993), p. 189).

election in April 1994 the CA was established. It had two years to fulfil its mandate. The CA's objectives of inclusivity, transparency, credibility, legitimacy and participation must be viewed in the context of CODESA and the legacy of apartheid.

The 34 Constitutional Principles provided the CA with both a framework for the constitution and a set of conditions with which the CA had to comply. In terms of the Interim Constitution, the final constitution would not be promulgated until the Constitutional Court had certified that the constitution complied with all of these principles.

It can be argued that the CA did not have a blank cheque with which to make the final constitution. The Constitutional Principles contained fairly inflexible parameters for constitution-making which had to govern the constitution-making process. The PPP was therefore restricted to act within the above mentioned framework and subject to the above mentioned conditions.

3.5 From liberation movement to civil society: An uneasy transition?

The unbanning of anti-apartheid organisations in 1990, and the subsequent constitutional negotiations at Kempton Park, changed the political landscape of South Africa. The liberation movements were standing at a political cross-roads, and new identities had to be defined both in terms of political parties and civil society organisations. It is important to bear in mind that the extra-parliamentary opposition to apartheid that became known as the "liberation movement" was not a homogenous group that shared the same ideology and the same ways and means by which to end apartheid.¹⁵⁴ The liberation movement had one goal in common; to replace the apartheid system with a new political system. In the late 1980's, the ANC leadership emerged as the main political negotiator from the liberation

¹⁵⁴Examples of extra-parliamentary opposition to apartheid: ANC, PAC; NACTU, SACP, UDF; COSATU, COSAS, AZAPO, The New Unity Movement, Cape Action League, South African Council of Churches and The Black Sash.

movement. The developments in the early 1990s, indicated that the ANC would be the dominant force in state politics in the years to come.

These developments gave rise to a debate on the role of the broader liberation movement in the new South Africa. The Mass Democratic Movement under the UDF was perceived to be aligned to the ANC. With affiliates that ranged from churches, trade unions to grassroots civic organisations in the townships, the UDF was an important internal force of mass mobilisation in the last years of apartheid. The UDF decided to disband after the ANC was unbanned in 1990, and the many organisations that were part of the UDF "relegated" themselves to sectoral interests. In 1992, the grassroots civic structures were organised into one national organisation called the South African National Civic Organisation. (SANCO). Although SANCO was perceived to be loosely aligned to the ANC, it saw its role as a grass roots civil society "watch dog" of the new democracy in which the ANC had taken the dominant role in state politics.¹⁵⁵ COSATU, which had been an affiliate of the UDF, entered into the Tripartite Alliance with the ANC and the SACP.

How could civil society be defined in the new South Africa? What role should civil society play in a South African democracy? These were some of the questions that were the subject of a debate in the early 1990s. The liberation movement's transition to civil society was widely debated and critically analysed. Khela Shubane, a political researcher, argues that the liberation movement as such did not have a role to play after South Africa had been liberated from apartheid. According to Shubane, the transformation would see the former liberation movement being incorporated as functionaries into state structures

¹⁵⁵The role of SANCO and its relationship with the ANC was itself an issue that caused debate. Mzwanele Mayekiso, a member of the ANC *and* prominent member of SANCO, fiercely defended the independence of SANCO and its distance to the ANC. He criticised Nzimande's and Sikhosana's expressed view that SANCO should be an ancillary to the ANC. (see "Hands off the Civics and civil society!" in *Work in Progress*, April 1992, p. 2).

rather than as autonomous civil society structures.¹⁵⁶ Political researcher, Mark Swilling maintained that civil society should be restricted to organisations, such as grassroots civic structures, that were promoting the concerns of the people on the ground. In terms of his view, "big business" interests should be excluded from civil society.¹⁵⁷ This view sparked criticism, Steven Friedman, amongst others, argued that the organisations that were part of the liberation movement regarded themselves *to be* civil society, and not as organisations *within* civil society. He claimed that the above mentioned interpretation of civil society, would give the liberation movement an opportunity to colonise civil society, and create an unhealthy state of affairs for democracy.¹⁵⁸

A major concern in these debates was whether the "new" civil society would be able to maintain its independence and be autonomous of the new ANC-dominated state. Professor Michael Neocosmos believed that the organisations that emerged from the popular politics in the apartheid years, were allied to the ANC, and accordingly state-allies. This implied that a substantial part of civil society was politicised "from above", and therefore became a form of "state politics" and an adjunct of the state itself.¹⁵⁹ Many political analysts saw this as a potential danger in the new political environment. Whereas some left-wing intellectuals were worried that civil society would not be politicised "from below", liberals were concerned that powerful political parties such as the ANC would absorb civil society and in so doing remove an important basis for a healthy liberal framework. Indeed, some voices within the Tripartite Alliance, such as Blade

¹⁵⁶Khela Shubane: "Civil Society in Apartheid and Post-Apartheid South Africa" in *Theoria*, May 1992, p. 35.

¹⁵⁷Mark Swilling: "Socialism, Democracy and Civil Society. The Case for Associational Socialism" in *Theoria*, May 1992, pp. 75-82.

¹⁵⁸Steven Friedman: "Bonaparte at the Barricades. Colonisation of Civil Society" in *Theoria*, May 1992, pp. 83-95.

¹⁵⁹Michael Neocosmos: "Intellectual Debates and Popular Struggles in Transitional South Africa: Political Discourse and the Origins of Statism", Paper presented at a seminar at the Centre for African Studies, 21 April 1999, p. 1.

Nzimande and Mpume Sikhosana, advocated that grassroots organisations such as the civic structures in the townships should not be separated from the state as that would "strip our struggle of its revolutionary content."¹⁶⁰

Neocosmos, critical of the ANC "state" argued that the new "top down" approach was evidenced by how the mass mobilisation was being used during in the Kempton Park negotiations.

"It came more and more obvious that such mobilisation was now initiated and directed solely from above by leading members of the ANC hierarchy and seen as a measure to put pressure on the negotiating partner, the National Party and the state. It was no longer part of "empowerment" directed by popular organisations themselves.¹⁶¹

This was seen as contradictory to the popular democracy that many in the liberation movement had envisaged for a post-apartheid South Africa. The ANC, he argued, had reduced popular democracy to a mere "participatory component" in a state democracy.¹⁶²

The views articulated during the above mentioned debate, demonstrate that the transition from liberation politics to national politics created a new political landscape. The debate also indicates that there was a shift in the political discourse of the ANC and the party's relationship to the broader liberation movement. As indicated above, the new political environment was not welcomed by all. During the Kempton Park negotiation process, the ANC established itself as the main opposing negotiation partner to the NP and the state. This showed that the ANC had moved from popular politics to national politics. The Interim Constitution that was negotiated and agreed by the parties at CODESA saw the introduction of a liberal democratic framework for the new South Africa. Although elements

¹⁶⁰Blade Nzimande and Mpume Sikhosana: "Civil Society and Democracy" in *African Communist*, no. 128, 1st Quarter 1992, p. 50.

¹⁶¹Michael Neocosmos: "Intellectual Debate and Popular Struggles in Transitional South Africa: Political Discourse and the Origins of Statism", p. 34.

¹⁶²*ibid.* p. 40.

within the liberation movement did not embrace the new political paradigm, they were forced to recognise that the ANC was now the dominant force in national politics and that the rest of the liberation movement represented sectoral interests within civil society. It is important to note that historically, the ANC's ideological position was based on popular democracy or unchecked majority rule.¹⁶³ Towards the end of the 1980's, the ANC adopted constitutionalism as the most viable solution for a new democratic South Africa. The critics have interpreted this as a concession to the ANC's main negotiation partner, the NP. Further, the role of constitutional experts in the negotiation process has been criticised for being a betrayal of the ANC's ideals of participatory democracy and social justice.¹⁶⁴

As indicated above, the ANC did not have a unified constitutional position. The ANC's alliance with the Congress of South African Trade Unions (COSATU) and the South African Communist Party (SACP), reflected a political and ideological diversity and all of the alliance members did not embrace the ANC's position on constitutionalism. This was particularly apparent before the 1994 election when scepticism and a rejection of liberal constitutionalism prevailed. After the 1994 election power shifted to the central leadership of the ANC, and *their* position became the position of the broader Alliance.¹⁶⁵

It is obviously debatable whether or not the new political paradigm was desirable. However, these were the parameters that were established through the negotiated settlement. Further, some of the critics of this new political paradigm fails to take into account the spirit of reconciliation that made a relatively "peaceful"¹⁶⁶ transformation possible. Accordingly, the new South African

¹⁶³Siri Gloppen: *The Battle over the Constitution* (1997), p. 200.

¹⁶⁴*ibid.* p. 200.

¹⁶⁵*ibid.* p. 89.

¹⁶⁶"Peaceful" is a relative description of the political events in the early 1990's. It is important to bear in mind that South Africa experienced a great deal of political violence during the transition period, most notably the Bisho massacre in

political community had to rely on compromises which could accommodate a diverse range of ideologies and political viewpoints could. Great concessions were made in the spirit of peace and reconciliation.¹⁶⁷ It is possible to argue that without this approach, transformation could not have been realised.

The ANC's participatory approach is reflected in Albie Sachs' proposed "model" for the new South Africa. Political Scientist Siri Gloppen provides a substantive examination of Sachs' model in her book *South Africa: The Battle over the Constitution*. However, for the purposes of this thesis, only Sachs' procedural criteria will be dealt with, because the content of the constitution is not the subject of enquiry in this thesis.

Sachs was a prominent ANC constitutional advisor and, as a member of ANC's constitutional committee, he played an important role in the Kempton Park negotiation process.¹⁶⁸ In 1994 he was appointed as a judge on the Constitutional Court. Sachs' justice model is procedural and he believes that public participation is essential to the legislative process, the electoral process and in the constitution itself.¹⁶⁹ The participatory formulation of rights is thus an essential part of Sachs' "justice model". The participatory processes will, according to Sachs, provide the end product with the necessary acceptability. In order for the legal document to be used and respected by all citizens, this acceptability is essential. In his model, Sachs emphasises the role of civil society. According to Sachs, civil society has to be stimulated and encouraged to participate in legislative processes. Involvement will increase awareness, education and deepen the consciousness of the

September 1992, the Boipatong massacre and the Chris Hani assassination in April 1993. However, the full-blown civil war that many predicted did not materialise, and it is in this context the description "peaceful" must be understood. It is not the intention of the writer to downplay or ignore the political violence that preceded the 1994 election.

¹⁶⁷Siri Gloppen: *South Africa: The Battle over the Constitution* (1997), pp. 202-205.

¹⁶⁸Before the CA was established.

¹⁶⁹Siri Gloppen: *South Africa: The Battle over the Constitution* (1997), p. 65

participants. Sachs maintains that the legitimacy of the constitution or a new law, depends on the level of public participation.¹⁷⁰

The CA defined civil society in its broadest sense. The following chapters show that the CA's public participation programme seems to be similar to Sachs' model of "participatory formulation of rights", and by implications the ANC's approach to participation. Habermas appears to have a more narrow understanding of civil society. This notwithstanding, Sachs' idea of a participatory formulation of rights shares many similarities with Habermas' model of discursive lawmaking.

3.6 Transformation: Creating accountability & legitimacy from the ashes of apartheid

The legacy of apartheid is multifaceted, and accordingly the challenges facing the new democratic South Africa are complex. The discriminatory race laws, and repressive security and emergency laws led to a distrust in legal institutions. Furthermore, the failure of the tri-cameral constitutional experiment of 1983 damaged the reputation of constitutional law. As Dugard puts it: "For many South Africans, law is no longer seen as an autonomous system of inherited rules, principles, values, and traditions designed to regulate society and to curb governmental excesses, but as an instrument to further the ideology of the National Party".¹⁷¹

For substantive and symbolic reasons, the transformation from the apartheid system to a constitutional democracy based on the rule of law, could only be accomplished through the drafting and implementation of an entirely new constitution. Marina Ottaway, an American scholar on international studies, says:

¹⁷⁰ibid. p. 65.

¹⁷¹John Dugard et al: *The Last Years of Apartheid: Civil Liberties in South Africa* (1992), p. 135.

"Symbolically it would mark the transition from the old to the new order, because the 1983 constitution had kept apartheid alive".¹⁷² The first step of constitutional transition had been accomplished through the adoption of the Interim Constitution. As indicated before, the Kempton Park negotiating process was necessarily constrained by the political context in which it took place, and accordingly did not include the broader public sphere in the will formation. For the South African transformation to succeed, a democratic culture and an understanding of law as a societal framework had to develop. The final constitution needed to be a living document that South Africans could own. In order to achieve this, the constitution-writing process had to facilitate participation by the public.

The Interim Constitution played its role as a peace treaty, and the responsibility of writing a legitimate constitution was left to the CA. The CA's emphasis on consultation and public participation may be regarded as an important element of the nation-building process which *inter alia*, aimed to replace political conflict and physical violence with dialogue and co-operation.

The project of nation-building involves the need to civilise the state and to build a relationship between the state, civil society and individual members of society by providing for debate and diversity. A consolidation of this relationship can, as Doreen Atkinson, a South African political researcher, points out, be achieved through participating in debates in the public space. According to Atkinson, this will establish a sense of a shared reality.¹⁷³

"We need to establish a culture of rights by opening the state to full popular participation and creating a free and vibrant communal life. Politics is concerned with constructing a truly participatory polity and civil society."¹⁷⁴

¹⁷²Marina Ottaway: *South Africa. The Struggle for a New Order* (1993), p. 89.

¹⁷³Doreen Atkinson: "Rights, Politics and Civil Society in South Africa" in *Theoria*, May 1992, p. 53.

¹⁷⁴*ibid.* p. 54.

In order to do this , the state has to recognise that all people are members of the human community and that the "weaker" members of the political community have the same rights, respect and access as those who hold more powerful positions in the political community. The "participatory component", as Neocosmos critically describes the post-apartheid dynamics, does not transform South Africa into a popular participatory democracy. However, it can help find a common ground in a country in which the lack of homogeneity has been a destructive force.

Habermas emphasises the importance of communicative power in the emergence of a new political paradigm or revolution. Communicative freedom replaces the use of violence in the political realm. The power of violence disintegrates when it is opposed by "the consensus-achieving force of communication".¹⁷⁵ In this regard, Habermas underlines the "close kinship between communicative action and the production of legitimate law."¹⁷⁶ Accordingly, the constitution-making process had to create an environment where people could make use of their communicative freedom and communicative power, in order to establish legitimacy of the constitution-making process and the post-apartheid democracy.¹⁷⁷ In this way, the constitution-writing process could play a vital role in the transformation of South Africa.

3.7 The political and administrative structures of the CA

As mandated by the Interim Constitution, the CA was established after the 1994 election. The CA included all of the political parties represented in Parliament, viz.

¹⁷⁵Jürgen Habermas: *Between Facts and Norms* (1997), p.148.

¹⁷⁶ibid. pp.147-149.

¹⁷⁷It is important to note that Habermas theoretical point of departure is a society where a democratic framework is already in place. His project is to show the importance of communicative freedom and communicative power of citizens in the production of legitimate law. Habermas argues that administrative power cannot ignore this influence in policy-and law making processes.

African National Congress (ANC), National Party (NP), Inkatha Freedom Party (IFP), Freedom Front (FF), Democratic Party (DP), Pan-Africanist Congress (PAC) and African Christian Democratic Party (ACDP).

In order to facilitate the practical implementation of the constitution-making process, various committees were established.¹⁷⁸ The Constitutional Committee (CC) consisted of 44 members. This committee served as a negotiating and co-ordinating structure within the CA. The CC dealt with content related issues.¹⁷⁹ To assist in the day-to-day management of the constitution-making process, the CC appointed a Management Committee (MC). In addition to the Chairperson and the Deputy Chairperson of the CA, the MC was made up of nine members from the CC. Whereas the CC dealt with substantive constitutional issues, the MC co-ordinated the activities of the administration and oversaw the day-to-day management of the CA.¹⁸⁰

Six Theme Committees (TC) were established in order to deal with the submissions the CA expected to receive from the public. Pravim Gordhan, a Member of Parliament, explained the role of the TCs:

"These Theme Committees are vehicles for both public participation and the participation of party-political groups and interest groups. As we have said, in the first instance they will be the recipients of contesting and divergent views on various subjects. It will be their task to isolate these views, to find common ground where that is possible and to process key issues."¹⁸¹

Each TC focused on specific aspects of the Constitution.¹⁸² TC1 focused on the "Character of the Democratic State", TC2 handled issues related to the "Structure of

¹⁷⁸The various committees consisted of members of the CA.

¹⁷⁹Hassen Ebrahim: "The Process of Drafting SA's New Constitution" - A paper presented to the International Round Table On Democratic Constitutional Development, 17 July 1995.

¹⁸⁰CA's Directorate Report: Work Programme 1995, Management Committee, 28 November 1994, p. 9-10. The MC's tasks included the preparation of agendas, work programmes and reports for the CC.

¹⁸¹Constitutional Assembly Annual Report 1996, p. 13.

¹⁸²Hassen Ebrahim: "The Process of Drafting SA's New Constitution. A paper presented to the International Roundtable on Democratic Constitutional Development. 17 July 1995, p. 5.

Government", TC3 dealt with the "Relationship between different levels of Government", TC4 was responsible for "Fundamental Rights", TC5 dealt with "Judiciary and Legal Systems" and TC6 concentrated on "Specialised Structures of Government". TC6 created a number of sub-committees to deal with various aspects of Government structures. The TCs were mandated to hear the views of and receive the submissions of civil society, the broader public and the political parties. Further, they had to process and develop these views and submissions, so they could be submitted to the CC.¹⁸³ Hassen Ebrahim, the executive director of the CA, notes that "the main function of the Theme Committees is to ensure the inclusive nature of the constitution-making process by receiving views and submissions from each of the role-players (...)Theme Committees are therefore the Constitutional Assembly's interface with the public."¹⁸⁴

In order to implement the constitution-making programme, the political body needed an administration to manage the day-to-day operation of the CA. The administration had a number of functions. It served as a secretariat to the political structures and it was also mandated to execute the PPP of the CA by making the process as inclusive as possible. Further, the administration provided the political structures of the CA with technical support which included, legal advice, legal drafting, research, communication services as well as human resources, IT and financial management.

The CA administration consisted of six departments: the Law Advisors Department, the Secretariat, the Research Department, the Administration and Finance Department, the Community Liaison Department and the Media Department. In addition to the CA Administration there were also technical experts: six Technical Committees were set up, one for each TC, in order to provide

¹⁸³CA's Directorate Report: Work Programme 1995, Management Committee, 28 November 1994, pp. 9-10.

¹⁸⁴Hassen Ebrahim: "The Process of Drafting SA's New Constitution. A paper presented to the International Roundtable on Democratic Constitutional Development, 17 July 1995, p. 6.

each TC with technical support. As part of their work, the Technical Committees had to conduct research on specific areas in order to furnish the TCs with information and advice on the submissions received by the TCs.¹⁸⁵ The CA also established a Panel of Constitutional Experts. This was an independent body which dealt with conflict resolution and ensured that the process complied with the constitutional mandate of the CA. The Panel had to be objective and neutral, and its members were prohibited from participating at a substantive level.¹⁸⁶

The Finance and Administration department managed the CA's budget and provided general administrative support.¹⁸⁷ The Secretariat supported the work of the TCs by providing secretarial functions and by acting as the liaison between the TCs and other departments in the CA administration.¹⁸⁸ The Legal Department's main function was to provide legal advice on constitutional issues and other matters linked to the process of drafting a constitution. The Legal Department also had to liaise with the Panel of Experts and the Technical Committees. Apart from guiding legal affairs internally, it had to assist with the processing of submissions to the Constitutional Court.¹⁸⁹ The Research Department was responsible for processing information from the TCs. In addition to this, the department was in charge of building an archive of all the documentation produced and received by the CA. It also had to assist the work of the TCs by doing research and collecting resource material and documents that were of relevance to the process.¹⁹⁰

As mentioned in chapter 1, the Community Liaison Department's (CLD) duties entailed facilitating public participation in the constitution-making process. In order to achieve this, it had to organise public meetings, hearings and

¹⁸⁵Constitutional Assembly: "Administration Manual", chapter 4.6, pp. 1-4.

¹⁸⁶*ibid.* chapter 4.7, pp. 1-2.

¹⁸⁷*ibid.* chapter 4.11, p. 1.

¹⁸⁸*ibid.* chapter 4.11, p. 1.

¹⁸⁹*ibid.* chapter 4.11, p. 3.

¹⁹⁰*ibid.* chapter 4.11, p. 4.

workshops for representatives of civil society and the general public. It also had to carry out a constitutional education programme.¹⁹¹

The Media Department (MD) was charged with the responsibility of creating a media campaign that was intended to stimulate public participation as well as create an awareness of the constitution-making process. The Media Department also acted as the CA's public relations office; it had to liaise with the press, deal with queries from the public and assist in maintaining "a good public image" for the CA.¹⁹²

3.8 The Public Participation Programme (PPP) - motivation, objectives and strategies

According to Ebrahim, South Africa's constitution-making process was unique in the modern history of constitution-making. In his paper "The Process of Drafting SA's New Constitution", Ebrahim explains why such a comprehensive exercise was necessary. The negotiated settlement encapsulated in the Interim Constitution, was a way of ending many years of conflict. Ebrahim observes that the objective of the settlement was to transform South Africa into a constitutional democracy.

"Implicit in the nature of the settlement was the need to bring years of mistrust and suspicion to an end. To this extent, the mandated representatives who were elected also as constitution makers were obliged to follow a path that would ensure that the final constitution is regarded as being legitimate, credible and enjoys the support of all South Africans."¹⁹³

Inclusivity, according to Ebrahim, was essential in order to ensure that the new constitution would endure.

In interviews conducted by CASE at the end of the process, a number of CA staff expressed their views on why the process needed to be inclusive. CASE

¹⁹¹ibid. chapter 4.11, p.4

¹⁹²ibid. chapter 4.11, p.3.

¹⁹³Hassen Ebrahim: "The Process of Drafting SA's New Constitution", p. 1

interviewed seven staff members of the CA: The Head of the Community Liaison Department, the Head of the Secretariat and the Head and the Deputy Head of the Media Department. The three members of the Directorate were also interviewed. The interviews were largely open-ended, and covered issues such as the interviewees perceptions of the CA's strengths and weaknesses, aspects in which the programme had exceeded or fallen short of expectations, internal decision-making processes and external events and actors that hindered or assisted the process.¹⁹⁴

Some of the CA staff who were interviewed by CASE believed that one of the reasons for a public participation exercise, was that the pre-election negotiations had taken place between "unmandated political parties".¹⁹⁵ Expressions such as "flawed for proper reasons", "peace treaty", and "bridge to today", were used to describe the pre-election negotiations at the World Trade Centre. The interviewees believed that there was a real danger that the Interim Constitution would not enjoy sufficient credibility and legitimacy and would consequently fail to provide the basis for a post-apartheid society.¹⁹⁶ Many of the interviewed staff gave impressions of the views in their private circles regarding the pre-election negotiations: They believed there had been a lack of accountability and that the ideal of democracy had been completely ignored. The interviewees pointed out that an inclusive constitution making process would be an important part of building democracy in the new South Africa.¹⁹⁷ Ebrahim, who had been present at the negotiations at the World Trade Centre, felt that the constitution should be a "living document". In order to achieve this, the process would need public involvement: "It must reflect the vibrancy of the society. To be vibrant you need

¹⁹⁴CASE: "Public Participation Evaluation" (preliminary report), March 1996, p. 2. This report will also be used in chapter 4 and 5, the chapters dealing with the implementation of the PPP.

¹⁹⁵ibid. p.2.

¹⁹⁶ibid. p. 2.

¹⁹⁷ibid. p. 2.

to ensure that more than politicians are involved."¹⁹⁸ CASE interprets the views that came across in the various interviews, to represent a commitment to make the PPP part of "nation-building"; to build legitimacy and to make the constitution an enduring document.

In September 1994, the CA had unanimously agreed that the constitution-writing process should involve civil society and the broader public. CA chairperson Cyril Ramaphosa emphasised the need for ownership in the process saying that: "It must be a Constitution they feel they own, a Constitution which they know and feel belongs to them. We must therefore draft a Constitution that will be fully legitimate, a Constitution that will represent the aspirations of our people."¹⁹⁹ It was believed that in order to create a legitimate constitution, the process had to be legitimate. As CA member Baleka Mbete-Kgotsisile put it: "The people of South Africa need to be involved. They must be consulted, in an organised fashion(...)in order for the new law to be sensitive to and shaped by their realities."²⁰⁰ CA member Colin Chabane emphasised the need to take the process to the disadvantaged: "We need to ensure that the communities along the Limpopo Valley also have their views heard in this Chamber and in our committee rooms. The final draft must reflect the views of our people in the villages, informal settlements, hostels, factories, towns and cities."²⁰¹

The CA identified three participation components; political formations with political representation, organised formations outside Parliament and the individual citizens. The PPP was intended to ensure that the latter two groups were involved in drafting the new Constitution.

¹⁹⁸ibid. p. 3.

¹⁹⁹Constitutional Assembly Annual Report 1996, p.40.

²⁰⁰ibid. p.40.

²⁰¹ibid. p.40.

In a workshop held on 30 September 1994, several issues were raised and discussed.²⁰² Participants indicated that the abstract nature of the constitution, as well as the lack of public awareness regarding constitutional issues, were problems that needed to be solved in the development and implementation of the public participation process. Further, the workshop emphasised the need to create channels which were accessible to women, the disabled, rural communities and generally the historically disadvantaged sectors. In addition to this, the workshop underlined the need to overcome language barriers when communicating, and consulting with the South African public.

On 31 October 1994, the Constitutional Assembly adopted a resolution titled: "Public Participation - A strategic Overview".²⁰³ In terms of this resolution, the CA resolved that in order to make the PPP "successful", both the Community Liaison and the Media Departments needed to be involved in the programme. The objectives expressed in the resolution emphasised the importance of drafting a constitution that had the support of all the people of South Africa. The resolution also indicated that the new constitution should represent the aspirations of South Africa as a whole. To succeed in making a constitution that would be "a cornerstone of the future of South Africa", the process should be "people-driven" and "transparent". According to the resolution, the implementation of the PPP would ensure that the new constitution would become the product of the ideas of all stakeholders. In this regard, the PPP should encourage and assist the creation of a dialogue between the public and the elected representatives. The resolution stated that the process should also express the interests of the country in its entirety, and in so doing avoid being party-political.

In order to deal with the issues and problems that might arise, the resolution outlined a contextual framework. The CA emphasised the challenges

²⁰²Constitutional Assembly Staff Workshop, 30 September 1994.

²⁰³Constitutional Assembly: Resolutions, 31st October 1994, p. 22 (CARes).

which were posed by geographical and historical factors; to make the PPP as inclusive as possible, it would be necessary to develop effective mechanisms to reach the rural communities.

The objective of the community liaison strategy was the following:

"(...)to facilitate an interface or dialogue between the South African people and their elected representatives by consulting the population on various levels and at various stages of the process of constitution-making".²⁰⁴

In order to do this, the CLD had to develop and introduce fora where face-to-face communication could take place. The strategy divides the public into two categories: "affected interest" and "general public". The "affected interest" category was defined as civil society and sector representatives. A special programme was created to accommodate the various sectors - this was known as the National Sector Hearing Programme (NSHP).²⁰⁵ The CA also developed area fora which were intended for grassroots community based civil society structures and broader public. The Area Fora were later called Constitutional Public Meetings (CPM).²⁰⁶ It was decided that the members of the CA would participate in these events in order to create face-to-face communication between the elected representatives and the public.

The CA strategy document states that the CLD had to facilitate accessible public information. In order to do so, provincial offices had to be set up. These information offices were to provide the public with information about the constitution-making process in all of the official languages.²⁰⁷ Later, the Constitutional Education Programme (CEP) was introduced.²⁰⁸ The objectives of

²⁰⁴Constitutional Assembly 28 October 1994, "Public Participation", 15.1, p. 49 (CA).

²⁰⁵Constitutional Assembly: Administration Manual, chapter 8.3 ("Programme").

²⁰⁶ibid. chapter 8.3 ("Programme").

²⁰⁷Constitutional Assembly: 31 October 1994, "Public Participation", 15.2.6 -15.2.7, p. 30 (CA).

²⁰⁸Constitutional Assembly Work Programme 1995.

this programme were to educate the public about the constitution making process, and to stimulate participation in the process.

The guiding principles for the process were transparency, credibility, legitimacy, inclusivity, consultation, ownership, empowerment and accountability.²⁰⁹ In this regard several communication objectives were outlined. The PPP had to develop, raise and popularise the profile of the CA. It also had to solicit views and receive submissions. Further, the CLD was responsible for briefing the public on the constitution-making process and explaining to the public the procedures for sending in submissions.

The CA decided that the media campaign had to inform, educate, stimulate public interest and create a forum for public participation. The media campaign had to convey the following message to South Africans:

"(...)to let people know that an important process is unfolding which affects their lives and those of the future generations; that every South African has a unique opportunity to take part in the drafting of a new constitution."²¹⁰

In order to succeed, several mechanisms were adopted. The media campaign had to use the existing channels of mass communication. In addition to this, the MD had to produce the CA's own material such as brochures, regular bulletins, posters, leaflets, cassettes and videos. The media strategy emphasised the need to reach disadvantaged rural communities.

The CA launched the media campaign in January 1995 and the Community Liaison Programme was in February 1995. At the beginning of April 1995, almost two months after the launch of the PPP, Roots Marketing and Research conducted qualitative research with regard to the perceptions of ordinary citizens about the constitution-making process and the constitution itself. The researchers asked

²⁰⁹Constitutional Assembly: Administration Manual, chapter 8.3 (Programme).

²¹⁰Constitutional Assembly 28 October 1994, "Public Participation", 14.2, p.42 (CA).

members of the public what they considered to be the most appropriate way to reach them and what mechanisms they could use to make a meaningful contribution to the process.

The research appears to reflect the psycho-graphic mindset of the population of South Africa at that time. Many white and coloured people displayed *pessimism and fear about being the "losers" in the new South Africa, and* accordingly they felt that their contribution to the process would not really count.²¹¹ The black community showed great enthusiasm and optimism, and an eager willingness and pride to be part of a process that would involve them.²¹² However, the report shows that rural women felt disempowered and displayed ignorance of the process. In particular, black women felt that they could not add any value to the process and that it should be left to those who know.²¹³ The report also warned the CA that there was a general public ignorance about constitutions and how they function.²¹⁴ The report also indicates, in terms of the respondents realities, that their expectations of what the constitution could deliver, were far too high, and that this could lead to disappointment when the final draft was presented.²¹⁵

3.9 Concluding remarks

The concept of a public participation approach to writing the constitution, was, in terms of the history of South Africa, a natural continuation of the culture of "liberation activism" that was prevalent in the country before 1994. But was the motivation for the CA's public participation approach a genuine commitment to

²¹¹Roots Marketing and Research: "The New Constitution. Research Findings", p. 19

²¹²ibid. p. 41 & p. 19.

²¹³ibid. p. 13.

²¹⁴ibid. p. 41 & p. 29.

²¹⁵ibid. p. 41.

public participation? Or was it a comprehensive marketing strategy - "selling" a product that was agreed upon by a small political élite?

The participatory approach outlined in the foregoing sections, raises questions about the actual objectives of the process. Despite the emphasis on inclusivity and consultation, the strategy and mechanisms described in the CA documents, also reflect a "campaign mentality" in terms of which the popularisation of the constitution and public stimulation appeared to be as important as genuine participation itself. In this scenario "consultation" and "inclusivity" would be mere "feel good" mechanisms, and the South African public would thus become the victim of what Habermas critically describes as "instrumental rationality" and "strategic action".

On the other hand, if the CA regarded public participation as an important and material element of the constitution-making process, and not merely as a symbolic exercise, the CA's ambitious objectives for public participation seem to exceed what could be realistically expected in the South African context and within the timeframes that had been stipulated. Within a short time frame, the CA planned to consult national civil society structures, grassroots community based organisations and the broader public across South Africa. The CA also wanted to educate and empower the South African public and to make the constitution a "cornerstone of the future of South Africa". Could these ambitious participation objectives be achieved in a country with such manifest socio-economic contrasts and with such deep and long-standing ethnic and racial divisions? It would seem to have been an insurmountable task at that time to accommodate the spectrum of views and attitudes in South African society. The Roots evaluation confirms the polarisation of South African society along racial and socio-economic lines. Further, South Africa is a country where 28 % of the adult population is

illiterate.²¹⁶ How would it be possible for the disadvantaged to make meaningful input in such as highly abstract legal process?

This notwithstanding, the intentions of the CA were commendable. In terms of Habermas' theory, the CA exhibited an understanding of the underlying tension between the coercive enforceability of law and the legitimacy of law. The disregard and lack of respect for the illegitimate apartheid law emphasised this tension. It is therefore particularly important that the law making processes in post-apartheid South Africa should be based on public participation. Further, the CA seemed to be aware of the external tension between facticity and validity. By designing mechanisms that could accommodate everybody, the CA in its planning tried to prevent that social facticity colonised the constitution-making process. In this regard, the CA, at least normatively met with the discursive criteria found in Habermas' theory. In the following chapters, the implementation of the PPP will be examined in order to determine whether the CA was able to implement the programme in accordance with Habermas' theoretical model as described above.

²¹⁶*Cape Argus*, 8 September 1999. The official estimate according to Education Minister Kader Asmal is 28 %. However, he believes that functional illiteracy could be as high as 40 %.

4. "A PEOPLE'S CONSTITUTION"?

4.1 Introduction

This chapter will examine the implementation of the outreach component of the PPP. The CPMs, the CEP and the NSHP will be examined in relation to Habermas' theory of discursive law making processes.

4.2 The Community Liaison structure

After a process of strategic development and planning, several proposals to the MC and CC, budgeting exercises and an appreciation of the operational time constraints, the CA programme began to take shape. As the dimensions of the PPP emerged, the department began to acquire the necessary human resources. The community liaison programme needed project managers, plain language experts, constitutional-legal expertise and provincial constitutional education co-ordinators (CEP co-ordinators). In addition to this, there had to be people who could manage and implement the logistics of the various operations. The CA also needed to be able to reach all the provinces and to liaise with grassroots community based civil society structures.

The department had two CEP co-ordinators in each province. They were responsible for briefing, building awareness and educating grassroots community based civil society structures, local governments and provincial governments in their respective provinces about the constitution-making process. Equally important, they had to consult with these structures both with respect to implementation of the PPP in their respective areas and the content of the

constitution itself. Eight South African Communication Service (SACS)²¹⁷ communications and logistics personnel were seconded to the CA. They worked under the management of the CLD, and assisted with logistics in the provinces during the CPM programme. Provincial SACS communication officers were also used in the initial part of the CPM programme to carry out provincial liaison functions. The CA arranged to accommodate eighteen CEP co-ordinators, mostly with a para-legal background, in the SACS regional offices. The CLD also had two project managers who were responsible for the provincial operations. They travelled to the provinces and briefed grassroots community based civil society structures, MECs, local government and other decision-makers. They also oversaw the management of the CPM programme in all provinces.

A project manager and three support personnel were responsible for implementing the National Sector Hearings Programme. They liaised with civil society structures and organised events in which the various sectors could make their input.

In addition to the eighteen CEP co-ordinators, the CEP component of the PPP, had a constitutional education co-ordinator and a resource-and training manager. They were responsible for developing educational resources in all official languages. They were also in charge of training the CEP co-ordinators on the CA process and on constitutional issues.

The CA Annual Report of 1996, reflects that considerable emphasis was placed on the PPP, both in terms of human and financial resources. The Community Liaison Department that was responsible for the face-to-face outreach component of the programme had the biggest number of staff members. The CA

²¹⁷The CA decided that the resources of SACS would be used in the implementation of the PPP. SACS was previously called the South African Bureau of Information, and was regarded as "the apartheid propaganda machine" (*Cape Times*: "GCIS - information or propaganda?", May 25 1998. Deploying them in a process that was intended to legitimise the new constitution was risky. It can also be interpreted as a conciliatory approach from the CA - a necessary element in an inclusive post-apartheid South Africa.

administration had in total approximately 130 members of staff out of which 45 were allocated to the Community Liaison Department.²¹⁸ In terms of financial resources, the total expenditure of the CA, in the period between 1 April 1995 and 31 March 1996, was just over 50 million rands. Of this, 31 million rands was allocated to the PPP. This figure does not include staff costs. This budget allocation was for the full PPP, in other words, it included the costs of both the Community Liaison programme and the Media programme.²¹⁹

The PPP was divided into pre-draft and working draft phases. The pre-draft phase ran from January 1995 to November 1995. The deadline for public submissions in the pre-draft was 30 June 1995. The CLD implemented the CPM programme, the NSHP and the first part of the CEP during this phase. The TCs ended their work in November 1995. The working draft phase, the final phase of the PPP, ran from November 1995 until the end of February 1996.

4.3 Constitutional Public Meetings (CPMs)

Between February and August 1995, the CA organised 27 CPMs.²²⁰ The CPMs were organised in all Provinces, mainly in rural and disadvantaged areas - from very remote rural areas such as Lusikisiki in the Eastern Cape, to disadvantaged urban areas such as the Ivory Park informal settlement in Gauteng. Through the CPMs, people led by grass roots civil society stakeholders, were able to communicate in person with the decision-makers. In organising CPMs, the CA had to take into

²¹⁸In comparison the second and third biggest CA departments, the Secretariat and the Finance and Administration Departments had 33 and 30 staff members respectively. This information is taken from the CA Annual Report 1996. However, staff members at the CA fluctuated according to need and it is only possible to give the approximate number of CA staff members.

²¹⁹Approximately 18 million rands were apportioned to advertising the constitution-making process. See Appendix 1: The CA budget for the period 1 April to 31 March 1996.

²²⁰According to the CA Annual Report 1996, 20 549 people attended these meetings, 200 Members of Parliament (MPs) participated and 717 organisations took part in the CPMs. (p. 44).

account the geographic, historical and educational profile of their target audience.²²¹

The CA regarded "civil society structures, and members of the public who have not enjoyed effective access to political processes in the past,"²²² as their main target group. Although all members of a community were invited and encouraged to attend CPMs, it appears that the people who could access the PPP through the print and electronic media did not in practice attend the CPMs in as great numbers as the people who had little or no other means of participating.²²³

The process of organising each CPM consisted of several stages. Before a meeting could take place, CA staff would liaise with provincial and local government.²²⁴ In addition to this, they would organise consultative meetings or briefings with local government structures and community based organisations and "elect a steering committee to assist with the organisation of the meeting".²²⁵ Edward Shalala, head of the CLD emphasises that the programme could not have worked without the active participation of local stakeholders. "If the people in the area were not part of organising the events and did not take ownership of the concept and the process, the meetings would not have worked".²²⁶ In addition to the consultative briefings, the CA organised Constitutional Educational Workshops (CEP) in order to inform grassroots-structures and individuals about the concept of a constitution, the nature of the process and how to participate in it.²²⁷

²²¹Constitutional Assembly Annual Report 1996, p. 44.

²²²*ibid.* p. 45.

²²³The CLD's own "internal evaluation" of the CPMs bear evidence that disadvantaged people to a greater degree than privileged South Africans used this channel to make input. (PPP - Community Liaison: CPMs Final Reports, Phase 1, 10 February 1995 - 25 June 1995.)

²²⁴CASE: "Public Participation Evaluation"(preliminary report), March 1996, p. 12.

²²⁵CA Annual Report 1996, p. 45.

²²⁶Edward Shalala's comments were made in an interview conducted 11 November 1998 in Cape Town.

²²⁷See 4.4 Section on CEP. The constitutional education co-ordinators also approached grassroots organisations which were not at the briefings or the CPMs and offered to run Constitutional Educational Workshop.

The actual CPM was made up of various components. The meeting had a facilitator and a chairperson, usually from the community. TC members from the CA attended in order to hear submissions from the audience. The facilitator was from IMMSA (Independent Mediation and Monitoring of South Africa).²²⁸ According to Shalala, IMMSA was chosen because they had credibility and were viewed by all parties as neutral. In some cases the facilitator would also act as chairperson. He or she would give a brief input explaining the objectives of the meeting and how the constitution-making process worked. There would also be an input from a local leader; a mayor, a leader in the community or a member of the Provincial Parliament. He or she would welcome the people and urge them to participate in the constitution-making process. Between 7 to 15 members from the various TCs of the CA attended each CPM.²²⁹ They would sit at a table at the front of the venue, listening to the public input and occasionally take questions from the audience. All the CPMs were electronically recorded. Audio tapes were later translated and transcribed. In order to break down language barriers, at least one translator was present at each CPM.²³⁰

According to Shalala, three types of submissions were received during the meetings. There were submissions on the issues that were being dealt with by a TC at the time. These issues were outlined in the programme - and were "focused and sometimes technical". When these issues had been canvassed, the participants were asked to make submissions on any other issues that they felt should be dealt with in the constitution. All participants were provided with a submission form so that they also could make written submissions. The CA believed that the people who attended the workshops prior to the CPM would have a better understanding of the constitution-making process, and would accordingly be more empowered to

²²⁸Constitutional Assembly: Public Participation Programme- Community Liaison. Constitutional Public Meetings - Final Reports: Phase 1, 10 February- 25 June 1995 (CA' internal evaluation on CPMs).

²²⁹*ibid.*

²³⁰*ibid.*

make their input. Shalala notes that at each CPM, a large number of free ranging submissions were made. These submissions covered a wide range of issues. According to Shalala "anything from religious rights to economic rights" were raised in the CPMs.

CASE noted that some CA staff felt that they had been "over-ambitious" with regard to grassroots participants making meaningful input. "Many participants did not have the requisite knowledge to make meaningful submissions." A large number of submissions were related to socio-economic issues. They thought this could possibly reflect a lack of understanding of the nature of a constitution "rather than an informed wish to have socio-economic rights entrenched." At the same time however, it was pointed out that this is a very complex debate, and "that people's overwhelming concern with socio-economic rights means that these are the most important issues to be included on the supreme law of the land."²³¹

Members of all political parties attended CPMs, not as representatives of their parties, but as representatives of their particular TC. As such their role was to get input on specific issues related to the work of their TC and also to listen to the inputs that were made on broad issues. Shalala points out that it was the first time in the political history of South Africa that political parties were able to share a common platform with their political enemies and opponents. "Such a short time after the first democratic election and after all the years of political turmoil and violence, the members of the various political parties had to jointly represent a common organisation, viz. the CA...and they did this without any party political bias."²³² This sentiment is echoed by the CASE interviews of the CA staff.

²³¹CASE: "Public Participation Evaluation" (preliminary report), March 1996, p. 14.

²³²The CPMs were not completely without party-political bias. As a provincial report after a CPM in Standerton, 13 May 1995, some TC members "introduced inputs with ANC slogans". Other reports indicate similar incidents. The CPM in Peddie, 6 May 1995, some TC members introduced inputs with "Amandla". On interrupted his input to address the issues of the Taxi feud in the area and reportedly "gave an ANC input".

One noted that "parliamentarians sometimes seemed to feel greater loyalty towards their Theme Committees than towards their party." According to the same report, many of the interviewees believed that facilitating an interaction between parliamentarians and the various communities, was one of their greatest achievements. "They were very enthusiastic in the way they embraced it. They took ownership...some came each week after a week in Parliament."²³³

Some of the CPMs experienced problems arising from local political rivalries. In KwaZulu-Natal, where the relationship between the ANC and the IFP at the time was characterised by conflict and violence, the process faced serious challenges. The challenges facing the CA programme in KwaZulu-Natal were exacerbated by the fact that the IFP had previously walked out of the constitution-making process. In explaining the poor attendance at a CPM, a CA internal report indicates that the "IFP tried to stop people from attending and went to some length to sabotage the CPM".²³⁴ The same report reflects an understanding of the CA's role and of the particular sensitivities in the area. "We are at great pains in this region to ensure that we do not give the impression to anyone that we are on their side despite our own personal ideologies and background. We don't ignore any political parties, neither can we be too friendly with any political parties." Despite this awareness, the CA did not seem to succeed completely in their efforts to be neutral. In the same document the author of the report, a CEP co-ordinator for KwaZulu-Natal, pointed out that some people in the CA's Operation Team "came across as being too ANC" in Kwa-Zulu Natal. The report also indicates that the briefings took place in mainly ANC dominated areas.²³⁵

²³³CASE: "Public Participation Evaluation" (Preliminary Report), March 1996, p. 13.

²³⁴Constitutional Education Programme Report, 18 July 1995 (Cassandra Gabriel).

²³⁵The CEP report from CEP co-ordinator Cassandra Gabriel states: "given the fact that briefings mainly took place in ANC-dominated areas, buses were sent to mainly ANC-dominated areas." In Constitutional Education Programme Report, 18 July 1995.

Shalala says that the IFP areas were difficult to access and potentially dangerous. There were incidents of what appeared to be IFP sabotage at the Empageni CPM on 26 August 1995 - this made the CA decide to cancel the Port Shepstone CPM on 2 September 1995.²³⁶

Given the size of the country, the socio-economic demographics and the general diversity, it does not appear that the CA reached its stated objective for the CPM programme, and certainly not in the terms outlined by MP Colin Chabane at the beginning of the process.²³⁷ 27 CPMs can hardly qualify as adequate consultation of "all" historically disadvantaged South Africans. Did the CA really think this was possible? According to CASE, the administration initially envisaged holding 300 meetings during the programme. They wanted to hold eight meetings per day. However, for religious reasons, the parliamentarians rejected the idea of holding meetings on Sundays. Further, it was argued that week-day meetings would cause too much disruption of the parliamentary schedule. CPMs were therefore mainly held on Saturdays.²³⁸

Shalala stresses that the total number of CPMs was prescribed by the tight operation timeframes of the process. Because of this, his department had to identify sub-regions within each province and "central nodes" within these sub-

²³⁶CPM Evaluation, Empageni 26 August 1995 (Report by CEP co-ordinator Cassandra Gabriel). This evaluation report reflects the political tension in the area. ANC supporters and IFP supporters were requesting separate buses to transport them to the CPM. The IFP reportedly intimidated both IFP supporters and ANC supporters not to attend the meeting. According to the evaluation, there was a heavy presence of police at the CPM. However, the author of the report appears to be dissatisfied that the CA management had made a decision to cancel the Port Shepstone CPM. The report states: "We will not be satisfied with steering clear of areas where problems could be expected as this would rule out our target audience, the most disadvantaged and oppressed. We ask that our commitment to trying to reach everyone in this province is met with a parallel commitment by the CA to ensure our safety."

²³⁷See section 3.8 of chapter 3.

²³⁸CASE: "Public Participation Evaluation" (Preliminary Report), March 1996, p. 11.

regions in which to hold public meetings. Buses were used to "ferry" participants, who did not have other means of transport, to and from CPMs.²³⁹

The CA's "reach the people who reach the people" strategy indicates that the CA was aware of the challenges they were facing, in terms of time constraints, financial constraints and logistical constraints. The CA intended to "stimulate" and "empower" civil society structures so they could take "ownership" of the process. Civil society was seen as an important conduit between the CA and the general public. CASE points out that the CA did not expect to "reach every poor rural woman, but rather reach leaders of their stokvels, women's groups, churches and other organisations."²⁴⁰ However, in the same report, it is mentioned that the CA did not get the same co-operation from local civil society organisations as the Voter Education Initiative of 1994. CASE argues that this was not surprising as the "constitution was a hotly contested issue, that included such emotive issues as the death penalty and abortion."²⁴¹

4.4 The Constitutional Education Programme (CEP)

The specific focus of the CEP was to "encourage" and "empower" rural, marginalised and disadvantaged communities to contribute to the constitution-making process. The CA said that the CEP would assist people to participate in a process they would otherwise have been excluded from. To this end, the workshops were mostly held in rural and poor urban communities. A report to the Chairperson of the CA also noted that the programme had a "broader educative

²³⁹The CPM reports from the meetings held between 10 February - 25 June 1995, show that hired local transport was used. Sometimes SACS staff were responsible for ensuring that people who wanted to attend, were provided with transport.

²⁴⁰CASE: "Public Participation Evaluation"(preliminary report), March 1996 p. 21.

²⁴¹ibid. p. 90.

function".²⁴² This included providing a general education on civic responsibilities and creating a human rights awareness. In this regard, the CA stated that it needed assistance from non-governmental organisations (NGOs) as well as community-based organisations (CBOs).

The programme was divided into two phases. The first phase introduced the constitution-making process to the community. The workshops, in conjunction with the CPMs, focused on "the constitution, the process and how to make submissions".²⁴³ As mentioned above, these workshops were intended to explain the participation process in order create awareness and to prepare and help people in the various communities to make meaningful input at the CPMs. Workshops were also held in areas where CPMs were not organised. These workshops were intended to encourage organisations and individual members of the public to send in submissions individually or as part of an organisation.

After the submissions had been received and the CA had formulated a working draft of the constitution, the role of the CEP was to report back to the communities and get comments on the working draft. The distribution of the working draft took place in January 1996. The workshops of the second phase were designed "to educate people about the Working Draft and to encourage people to comment."²⁴⁴

CASE evaluated the working draft phase of the CEP. CASE researchers observed the proceedings at five workshops. They interviewed participants at the end of each workshop. Participants were also given questionnaires at the end of the workshop.²⁴⁵

²⁴²Constitutional Education Programme: "Report for the Chairperson of the CA", 23 March 1995.

²⁴³ibid. 23 March 1995.

²⁴⁴Constitutional Assembly: 1996 Annual Report, p. 57.

²⁴⁵CASE: "Evaluation of CEP meetings for the Constitutional Assembly"(preliminary report), March 1996, p. 2. CASE researchers attended a workshop at Kempton Park (16/2/96), two workshops in Durban (19/2/96), one in Escort (17/2/96) and one in Saldanha (18/2/96).

CASE found, with exception of the Saldanha workshop, that English was spoken more than any other language in the workshops that it attended. Although the main language that was used in the Saldanha workshop was Afrikaans, translations for Xhosa speaking participants was provided. Similarly, the workshop in Escort was translated into Zulu. At other workshops, translations were provided when participants asked a question or raised an issue in another language. According to CASE, English was used most frequently, because these workshops were "mixed-race" gatherings, and English was the language that most could understand.²⁴⁶

CASE found the CEP co-ordinators to be knowledgeable and able to handle the workshops well. The facilitators were able to answer questions and encourage participation in the discussion. However, at one workshop the facilitator "appeared to have difficulty answering all questions adequately." According to CASE, the main strength of the facilitators was that they were flexible and adapted their workshops to the audience numbers, language and time constraints.

CASE recorded that in all workshops, some participants spoke more than others. However, the facilitator encouraged people "who were speaking for the first time in an attempt to allow more people to participate."²⁴⁷ CASE points out that although the facilitators "ran" the workshops, they tried to encourage participation in order to make the workshops as interactive as possible. Gender imbalances appeared to influence participation, and the report found that in some workshops there was "poor participation" from women. The report states that racial imbalances did not appear to affect participation in this way. ²⁴⁸

CASE reported that the workshops were well organised, with trained and experienced facilitators. The report notes that the evaluation took place in the last

²⁴⁶ibid. p. 5.

²⁴⁷ibid. p.6.

²⁴⁸ibid, p. 7.

week of the programme and accordingly the "facilitators were at their most experienced stage."²⁴⁹

CASE states that the participants appeared to have little prior knowledge about the constitution-making process. However, according to the report, a few individuals, usually those who were active in community organisations were better informed. A range of issues were discussed at the workshops including local government, citizenship, protection of property, right to life, the national anthem, the abolition of the death penalty, the retention of the death penalty, outlawing abortion, permitting abortion and free political activities.

The CEP workshops were planned to last for three hours. However, in some cases there were too many people for a proper workshop to be conducted. These would be converted into one hour "briefings". Briefings would also be slotted into other previously arranged meetings such as local government meetings and RDP fora. Whereas the workshops focused on educating the public about the constitution and how to make submissions, the briefings were used only to disseminate information.²⁵⁰ According to the CA's own figures, over 42 000 people were reached in 181 workshops and 209 briefings.²⁵¹

Based on the evaluation above, it appears that the CA managed, to some extent to create a constraint-free environment in the CEP. Although the CEP was not primarily a mechanism to influence decision-makers, it empowered people to do so. Further, in terms of Habermas' theory, the constraint-free environment in the workshops, where people could raise issues and discuss them with people with different views, enabled people to develop a greater understanding of other viewpoints.

²⁴⁹ibid., p.7.

²⁵⁰See Appendix 4 for a break-down of grassroots organisations that participated in the CEP Workshops and Briefings.

²⁵¹CASE: "A New Constitution for a New South Africa. Evaluating the Constitutional Assembly." October 1996, p. 70. See appendix for number of community organisations reached in the CEP workshops and briefings.

4.4.1 PLAIN LANGUAGE

The CA made plain language an integral part of the process because plain language was seen as an important mechanism in order to help ordinary people to understand complicated legal terms and constitutional concepts, for making the constitution-making process more accessible and for producing a constitution that was comprehensible to every strata of society. CA publications including the publications that were used in the workshops and even the final constitution itself, were written as plainly, simply and clearly as possible. All CA material was translated into all 11 official languages. Derrick Fine, legal resource and training manager at the CA explained the plain language approach:

"Legal language is an important example of language that is hard to understand. Building a human rights culture under the new constitution will be meaningless if people do not understand their rights and what steps they can take to enforce them. Plain language helps to turn the right to information into something that people actually experience - by putting things in clear and understandable language."²⁵²

From interviews conducted among the drafters of the new constitution, CASE revealed a general consensus that "the constitution, together with all or many other laws, should ideally be accessible to ordinary citizens."²⁵³

The first plain language publication produced by the CA, was a booklet for use in the CEP.²⁵⁴ The booklet provides a background to the new constitution; clarifying the purpose and meaning of the constitution and explaining how the CA worked. It also encourages the public to take part in the making the new constitution and explains how they could get involved and how they could send in submissions. It uses graphics and practical examples. The booklet is written in a

²⁵²Derrick Fine: *How to use Plain Language*, LEAP Publication 1995, p.2.

²⁵³CASE: "Evaluating the Plain Language Initiative: Part I. Interviews with Constitutional Drafters", April 1996, p. 33.

²⁵⁴CA Publication - booklet: "You and building the new Constitution".

plain and accessible language, where technical terms are explained or avoided completely.

The CA had agreed in principle that the constitution should be written in plain language thus, "making it a document which is accessible to the broad public, and a document which is 'owned' by the citizens of South Africa."²⁵⁵ In the Working Draft phase of the constitution-making process, the CA decided to give the public an opportunity to participate in deciding the format to be used when writing the constitution.²⁵⁶

Roots organised focus groups to evaluate the language and format of the working draft of the constitution. The findings confirmed the above mentioned views of the CA. People said that they often felt embarrassed and stupid about asking questions when they did not understand complex language. This was particularly true for the lower income groups: "We can't always afford lawyers, so most people sign on the dotted line and hope and pray for the best."²⁵⁷ Further, Roots found that the respondents were of "one mind" regarding public education, consultation and plain language; the drafters of the constitution would be more able to write in an accessible manner if they were aware of how "ordinary people" were thinking. This they could only achieve through public participation and education.²⁵⁸

The CA went on to draft the final constitution in plain language. Etienne Mureinik, a constitutional expert, in an article describing the simple language used in the constitution wrote that: "All legalese has been taken out. No more "heretofores" and "pertainings" or "upon such conditions as the appropriate authority may deem fit".²⁵⁹

²⁵⁵CA Project Proposal: "Plain Language and the Constitution", November 1995.

²⁵⁶*ibid.*

²⁵⁷Plain Language Assessment (reports from Roots, CAE and CASE): "Project Plain Language Testing" by Roots Research SA, p. 7.

²⁵⁸*ibid.* p. 9.

²⁵⁹*Mail & Guardian*, 22 December 1995 - 4 January 1996, p. 17.

CASE, in evaluating the "plain language initiative of the CA", suggests that the "draft constitution is indeed very readable."²⁶⁰ 41 % of those who had read the draft constitution understood "everything", 17 % understood "a lot" and 33 % understood "some". Only 9 % had difficulty with the language. This was, according to CASE, a "remarkable success for the Assembly."

However, Siri Gloppen argues that the final constitution *may be* too complex for ordinary people. Although it is written in a simple language, she claims that in a country with poor education for the majority of the population, it makes it difficult for ordinary South Africans even to understand the "plain" language of the new constitution.²⁶¹ To some degree CASE shares Gloppen's perception, and cautions that plain language drafting, however skilled will not make legislation accessible to the large majority of the South African population "who do not know English well and/or cannot read and write well."²⁶²

On the other hand, Justice Davis, at the time a law professor, argues in an article in *Mail and Guardian*, that the plain language approach can possibly create legal confusion over the interpretation over the constitution.²⁶³

According to Habermas, plain language acts as a medium between the life world and the system world. Ordinary or plain language can be seen as a metalanguage which translates specialised codes. Normally, the special codes found in the system world exclude participation by the people in the life world who understand and use ordinary language when communicating. Ordinary

²⁶⁰CASE: "A New Constitution for a New South Africa. Evaluating the Public Participation, Media, Education and Plain Language Campaign of the CA", April 1996, p. 36. The evaluation is based on a national survey of 3800 adults of all races from across South Africa.

²⁶¹Siri Gloppen: *South Africa: The battle over the Constitution* (1997), p. 275.

²⁶²CASE: "A New Constitution for a New South Africa. Evaluating the Public Participation, Media, Education and Plain Language Campaign of the CA", April 1996, p. 36. It must be noted that the final constitution was translated into all 11 official language, and accordingly would be accessible to people who do not speak English well. See Chapter 5.

²⁶³Dennis Davis: "Is our new constitution any good?" in *Mail and Guardian*, 10 May 1996.

language thus, forms a universal horizon of understanding.²⁶⁴ Habermas argues that the "language of law" can function as a "transformer in society-wide communication circulating between system and lifeworld."²⁶⁵ Using plain language in the constitution-making process made specialised legal codes accessible to ordinary people and can be seen in Habermas' terms, to connect the system (the CA and the constitution) and the lifeworld.

4.5 National Sector Hearings Programme (NSHP)

NSHP was designed to play a different role in the PPP. Whereas CPMs and the CEP were directly and specifically targeted at grassroots communities and civil society structures in disadvantaged and rural areas, the NSHP was aimed at civil society structures regionally and nationally. The NSHP focused on the umbrella structures and national offices of organisations. Involving the various sectors and organisations in the process, provided the drafters of the constitution with an opportunity to engage with people who had first hand knowledge of issues affecting their specific sector.

The majority of the hearings in the first phase took place in May and June 1995. Twelve hearings were held. Organisations in the following sectors were consulted: Judiciary and Legal Systems, Business, Children's Rights, Traditional Authorities, Religious groups, Youth, Labour, Women, National Machinery and the Advancement of Women, Local Government, Socio-Economic Rights and Land Rights. In total, 596 organisations were consulted in the sector hearings programme.²⁶⁶

²⁶⁴Jürgen Habermas: *Between Facts and Norms* (1997), p. 352.

²⁶⁵*ibid.* p. 81.

²⁶⁶Constitutional Assembly Annual Report 1996, p. 47-49. By comparison, there were 26 CPMs where 717 grassroots structures were consulted (see Section 4.2). See Appendix 2 for a break-down of organisations that were consulted in the NSHP.

Due to relatively heavy logistical arrangements and time constraints, the CA decided to form partnerships with civil society organisations including NGOs, to assist with the organisation of 75 % of these events.²⁶⁷ These organisations provided the CA with database information about stakeholders in various sectors. The TCs had to make the final approval of the list of stakeholders. A process of choosing "which sectors would best inform the process and which sectors would best fulfil political obligations"²⁶⁸ took place. The TCs had to decide whether the proposed list of stakeholders (invitees) for each hearing was inclusive, represented a balance of viewpoints and was able to provide the technical input the TC needed. Head of Community Liaison, Edward Shalala points out that any national or regional civil society structure who wished to participate was welcome to do so.²⁶⁹ The Secretariat in co-operation with the TCs and MC identified which CA members would attend each of the hearings.²⁷⁰

The CA emphasised that the NSHP "was not a decision-making or debating structure". Rather, the hearings were an opportunity for representatives of the various sectors to make their input and submissions. Further, the hearings were not intended to be "a forum to achieve consensus and the Constitutional Principles were not open for debate".²⁷¹ Oral and written submissions had the same status. After the hearing, the submissions were processed by the relevant TC.

A day was set aside for most hearings and in most cases the same basic programme was followed.²⁷² To ensure that oral submissions were recorded, audio and sometimes also video recording were used. The hearing began with an

²⁶⁷The CA formed partnerships with Institute for Democratic Alternative for South Africa (IDASA), The Institute for Multi-Party Democracy (MPD) and the Human Sciences Research Council (HSRC). These organisations were regarded as credible partners.

²⁶⁸Constitutional Assembly Annual Report 1996, p.47.

²⁶⁹Interview with Edward Shalala on 29 August 1999 in Cape Town.

²⁷⁰Constitutional Assembly Annual Report 1996, p. 47.

²⁷¹Constitutional Assembly: Annual Report 1996, p. 48.

²⁷²CA Briefing Documents for Public Sector Hearings: Labour Hearing and Women's hearing, 30 May 1995.

explanation of the objectives of the hearing, an overview of the programme and an explanation of how the hearing would be conducted. The designated chairperson of the hearing facilitated the session. He or she had to ensure that the various inputs were made within the time that was allocated and that a spread of organisations and structures were given an opportunity to speak. Each hearing had a number of speakers. The purpose of their input was to stimulate further contributions. The CA emphasised that their speeches would have the same status as those who made submissions during the open discussion time.

The hearing would then proceed to a plenary discussion where TC members and participants could ask each other questions of clarification. The sector representatives who had not submitted a written input would be given preference to speak. The members of parliament were introduced as members of the various structures of the CA.

As pointed out above, the CA emphasised that the NSHP was not a "debating structure". The objective of the hearings was to get input from civil society. The hearings and meetings were largely a one-way channel where the various participants made inputs and the politicians listened to these inputs. This led some civil society stakeholders to complain that the CA was not prepared to engage in public dialogue on what were being submitted.²⁷³ Would such a "public dialogue" have added legitimacy to the process? In this regard, one has to take into account the purpose of these hearings; - they were a means for civil society to make inputs in the drafting of the constitution. A public debate would have had practical implications in terms of timeframes and deadlines. A debate is by nature open-ended, whereas a decision-making process requires closure. It would have been difficult, and indeed impractical for the CA to engage in an open-ended public dialogue with civil society stakeholders. More importantly, if the CA had decided to facilitate debating fora, it is possible that the participants would have been

²⁷³ *Mail and Guardian*, 29 March 1996.

motivated strategically rather than motivated by the issues. In this regard, the discussion would have run along party-political lines, and, accordingly would have been dictated by political programmes and ideologies rather than by the issues. In the NSHP, the members of the CA represented their TC - not their respective party. Accordingly, party-political motivations were avoided completely. One also has to take into account that a debate would have given people with debating skills an advantageous position - participants who did not possess these skills and who felt uneasy to argue the point would have felt disempowered. It can be argued that the NSHP created a constraint-free forum, where the participants could listen to each others' views and inputs, rather than being a forum where competing interests engaged in an open-ended debate.

The CA Annual Report for 1996 noted that the hearings received substantive submissions on various issues. The process was also an important vehicle both for the CA and the civil society to broaden their understanding of specific issues. The report stated that the CA believed that they had succeeded in their objective of empowering South African civil society by giving them an opportunity to participate in the constitution-making process. The report concludes that:

"The involvement of civil society in the constitution-making process has set a precedent for the rest of government. This process has not only enabled civil society to participate in the normal process of submissions, but has gone further in creating a culture of lobbying and thereby participating in the process of governing. The skills and experience gained during this process must be passed on to government, to enable effective governance in partnership with civil society."²⁷⁴

In the second phase of the process, the NSHP played a different role. Hearings would only take place if there were issues that needed further clarification.²⁷⁵

²⁷⁴Constitutional Assembly Annual Report 1996, p. 52.

²⁷⁵The CA had already received submissions from civil society stakeholders in the first phase of the process. The need for further clarification seems to indicate that the CA took the opinions of the various sectors seriously.

The CA also decided to accede to requests from sectors who wished to have a hearing.²⁷⁶ In this final phase of writing the constitution, stakeholders also had an opportunity to lobby the CA politicians directly.

According to interviews conducted by CASE, CA staff members expressed disappointment that they did not get the range of organisations nor the interest they had hoped for. "We would expect business, youth, women, teachers, workers, civics etc. and find only four structures instead of ten." According to some staff members, the lack of response from organised sectors such as women and COSATU, was particularly disappointing. On the other hand, some of the CA informants praised trade unions for the way they had assisted in "disseminating publication and information to their members."²⁷⁷

According to Habermas, civil society is an essential element in opinion-and will formation. The many organisations and voluntary associations that constitute civil society should ideally resonate the opinions and views of the private sphere. Civil Society acts as a discursive problem-solver for the private realm.²⁷⁸ Civil society has to transform the public influence it possesses into communicative power. It is this communicative power that legitimates political decisions; "...it passes through the filters of the institutional procedures of democratic opinion-and will formation and enters through parliamentary debates into legitimate law-making".²⁷⁹

The CA recorded that, through the PPP, it had consulted 717 grassroots organisations and 596 national civil society structures.²⁸⁰ From these statistics, it would appear that both community based organisations and national civil society

²⁷⁶According to Shalala, only one sector took this opportunity to have another hearing.

²⁷⁷CASE: "Public Participation Evaluation"(preliminary report), March 1996, p. 22.

²⁷⁸Jürgen Habermas: *Between Facts and Norms* (1997), p. 367.

²⁷⁹ibid. p. 371.

²⁸⁰See Appendix 2, 3 and 4 for a break-down of organisations consulted in the process.

structures had equal access to participate in the process. However, the likely imbalance of human and financial resources between the CBOs and national civil society structures would tend to indicate the opposite. The disadvantaged grassroots civil society structures would have only been able to participate by attending the CPMs or by sending in written submissions. Apart from the sector hearings, the national organisations were able, as the CA's Annual Report pointed out, to "lobby" the politicians directly throughout the process. Many of them were based in Cape Town, and accordingly situated close to the decision-making centre. This would have given them a much greater opportunity to have an impact on the final outcome of the process. Small, rural organisations which were not affiliated to a national umbrella body or coalition, would not have had the resources to follow up their written and oral submissions. The national civil society structures would also have been in an advantageous position to influence the decision-makers due to their "expert-knowledge" in their respective field. Such expertise would probably have given their submissions more weight and status.

In terms of Habermas' emphasis on civil society's role in legitimate lawmaking processes, civil society must be given the opportunity to influence the outcome. Flowing from the above discussion, there seemed to be a relative imbalance between well-resourced and disadvantaged grassroots organisations. Given the time-constraints, geographical problems and socio-economic demographics, it is difficult to see what the CA could have done to rectify this weakness in the programme. It must be borne in mind that the CA was aware of these problems. Although the organisations participating in the NSHP did not directly represent the people on the ground, many were linked to them through the interests they were representing. It is also important to remember that many of the national civil society structures that participated in the NSHP did not represent what is traditionally perceived to be powerful interests.²⁸¹ In terms of

²⁸¹See section below (4.6).

Habermas' theory, the NSHP was therefore an extremely important component of the programme. Did the CA give these organisations the opportunity to influence the final outcome? The next section will give an indication of the impact civil society structures had in the constitution-making process.

4.6 Civil society in the constitution-making process

As mentioned above, the PPP had short time frames which made it impossible for the CA to reach everybody. As Hassen Ebrahim said: "You can't reach 48 million (sic.) in two years, it is therefore important to engage civil society, they will in turn take the process back to the people and educate them. The CA wanted to reach the people who reach the people in order to get impact".²⁸² As mentioned above, the NSHP was seen as an important mechanism in this regard. The sector hearings were intended to facilitate substantial input into the constitution-making process and to create ownership. The CA wanted the participating organisations to become "a medium between the CA and the broader public". Thus civil society had to share the "burden of responsibility with the CA".²⁸³ But did civil society feel that they were able to make an impact on the constitution? This section will give an indication of the views of some of the role players from civil society.

Mandla Gxanyana, General Secretary of the Food and Allied Workers Union (FAWU) at the time of the constitution-making process, explains how his union participated in the process.²⁸⁴ The issues were first debated by FAWU members at the "factory level." Other issues were raised, debated and formulated by FAWU's local branches. Each branch or factory then proposed resolutions to the FAWU congress. The issues were debated and the FAWU congress formulated its position.

²⁸²Executive Director of the CA, Hassen Ebrahim at the ComTask Hearing, 10 September 1996.

²⁸³Interview with Edward Shalala, 29 August 1999.

²⁸⁴Interview with Mandla Gxanyana conducted in Cape Town, 29 September 1999. FAWU is a large union with over 100 000 members. It is a member of COSATU.

This position was then presented at the COSATU congress. The COSATU congress formulated its position by taking into account the resolutions of its members. COSATU appointed a full time parliamentary "lobbyist" whose job it was to "lobby" the constitution-makers. According to Gxanyana, this enabled the voices of the factory workers to be heard in the corridors of power. Gxanyana argues that having a full time lobbyist "guaranteed" that the workers views were conveyed in a manner that "met with the criteria of legal language". Gxanyana believes that the constitution reflects the "will of the people." The constitution, according to Gxanyana, reflects "a balance of power - between those who have and those who have not."

Jeremy Sarkin, a law professor and a prominent member of the Human Rights Committee of South Africa, participated in the process as a stakeholder with respect to human rights issues. Sarkin's paper "The Role of the 1996 South African constitution in promoting a human rights culture,"²⁸⁵ evaluates both the process, and how the issues that he was lobbying were accommodated in the constitution. Sarkin concludes that the final constitution "further entrenches human rights as a cornerstone of South African democracy." He further believes that the process and the end product "reflects to a large degree" a genuine participatory process. Sarkin recognises that the credibility of the drafting process is essential for the legitimacy of the constitution and the bill of rights. According to Sarkin, this "can constitute a major force for national unity". The South African reality necessitated an inclusive and legitimate process in order to "inspire a sense of national ownership". Sarkin believes that a process that did not take into account the above mentioned mechanisms would have the opposite effect.

Sarkin does however, raise some problems with regard to the drafting process. While he believes that the overall process was "commendable", he

²⁸⁵Jeremy Sarkin: "The Role of the 1996 constitution in Promoting a Human Rights Culture", www.legalcity.co.za.

observes that transparency of the process was reduced in the final stages of negotiations. He believes that this level of "secrecy resulted in public ignorance of how disagreements were being resolved and scepticism about the seriousness with which comments from the citizenry were being regarded." From Sarkin's point of view, the process should have been open even in the most delicate final stages of negotiation, in order to "secure confidence in participatory programmes for future legislative and governmental processes."

Alison Tilley participated in the constitution-making process as a representative of the Black Sash.²⁸⁶ She actively campaigned to influence the CA on a number of issues. Administrative justice, socio-economic rights and freedom of assembly, were some of the issues that she lobbied for. The Black Sash also made general submissions with regard to capital punishment, the equality clause, freedom of expression and information and state institutions supporting democracy.²⁸⁷ Tilley participated in the Gender rights hearing which was part of the CA's NSHP. In addition, she, together with other civil society stakeholders, succeeded in organising a workshop with TC4 in order to deal with socio-economic rights. This workshop was not part of the CA's official programme. Tilley believes that the CA showed "a strong commitment to openness" throughout the process.²⁸⁸ She says that at no point did she feel that she did not have access to the decision makers. According to Tilley, the submissions the CA received from civil society and the participation by civil society throughout the process clearly had an impact on the final constitution. She mentions administrative justice as an area

²⁸⁶Black Sash was founded in 1957 and was initially known as The Women of Defence of Constitution League. The name Black Sash originated from the black sashes that the women wore to symbolically mourn the death of the constitution and human rights. The Black Sash was established in opposition to the removal of coloureds from the voters' roll. In the 1960s, when organisations were banned, people were going underground or were in exile, the Black Sash was one of the few organisations that was not banned. The organisation were therefore able to express their opposition to apartheid laws.

²⁸⁷The Black Sash Trust Annual Report 1996, p.18-19.

²⁸⁸Tilley's comments were made during an interview conducted on 17 March 1999 in Cape Town.

where the Black Sash succeeded in influencing the decision-makers to include such an issue in the constitution. Because the Black Sash was one of a few organisations that lobbied for this issue, she believes it clearly showed that they as a stakeholder had an impact. Tilley notes that civil society stakeholders were more successful when they were working together on issues. The co-operation between the Black Sash and the National Coalition for Gay and Lesbian Rights on the question of sexual orientation illustrates this kind of approach. Tilley felt that all the issues she as a stakeholder had raised, had been addressed in the process.

Tilley sums up the process in the following way:

"Overall, from our point of view, we came away from the process with a sense of ownership of the constitution. There may have been clauses that we were not particularly crazy about, but there is no way we could be able to say that it was not our document. I think that was the key indication of the success of the CA, that we were able to come away and not regard it as a document that had been forced on us. It was a document that we participated in making and which we were, and are, fully committed to."

Tilley however, observes that the majority of South Africans, the people who live in poverty and who have limited access to resources, were not able to participate in the same way as more resourced stakeholders. Tilley says that "we have to accept that there was a level of "representative democracy" rather than participatory democracy. This is not inappropriate for a country at our stage of development."

Another stakeholder, Vincent Saldanha participated in the constitution-making process through submissions made by the Legal Resources Centre (LRC) and as a member of National association of Democratic Lawyers (NADEL).²⁸⁹ These organisations made input with regard to the legal issues; in particular with regard to the courts and how these should be structured. Further, they made submissions, and lobbied for the inclusion of socio-economic rights in the constitution. Saldanha participated in one of the sector hearings and he was involved in

²⁸⁹Vincent Saldanha is the General Secretary of NADEL.

organising a workshop on socio-economic rights which was attended by members of the CA. Saldanha's organisation arranged for "international experts" on socio-economic rights to attend this workshop.

Despite being reserved about public participation in the constitution-making process, Saldanha believed that the issues he lobbied for were included in the final constitution.²⁹⁰ "We think that the politicians in the dominant party (ANC) were committed to including such rights in the constitution. Thus while public participation is important, one must not over-emphasise the role it played in the process." Saldanha concedes that this kind of participatory process was important as it "enabled ordinary citizens to feel part of the constitution-making process". Saldanha mentions that his organisation also worked together with less privileged civil society organisations. In lobbying for socio-economic rights, they worked with organisations such as the Homeless People's Association.²⁹¹

Saldanha shares Tilley's views regarding the accessibility of the TC members. According to Saldanha, although TCs were "very busy", they always had time to listen to the views of his organisation.

Gxanyana, Sarkin, Tilley and Saldanha seem to share a similar perception of the constitution-making process. They are generally positive about the CA's public participation programme, although Saldanha is more reserved in his assessment of the role that the PPP played in the constitution-making process. They also commended the accessibility of the CA and the opportunity provided to civil society to influence the final outcome. The comments from stakeholders interviewed for this thesis indicate that they had access to the process and that their submissions influenced the outcome.

²⁹⁰Vincent Saldanha's comments were made in an interview conducted 4 May 1999 in Cape Town.

²⁹¹This organisation mobilised its members and staged a demonstration outside the CA carrying placards with demands such as "the right to water", "the right to housing" and "the right to electricity".

In terms of Habermas' theory, FAWU is an "output-oriented" organisation. Habermas defines these organisations as "clients" of the state. On the other hand, the Human Rights Committee of South Africa, The Black Sash and NADEL and LRC are "input-oriented" organisations. According to Habermas, these public interest groups can be regarded as "suppliers" to the state. As pointed out in chapter 2, Habermas appears to view non-economic and non-governmental organisations as the core of civil society. Accordingly, for Habermas, public interest groups such as the Human Rights Committee of South Africa, the Black Sash and NADEL are of more importance in discursive law-making processes, than for example a trade union such as FAWU.

Tilley's acknowledgement of the imbalances between resourced and disadvantaged stakeholders, underlines the issue raised in section 4.5 above. It appears that national organisations enjoyed a greater access to the constitution-making process. The CA's objective was to involve the "entire population", with a particular emphasis on disadvantaged sectors. While they did facilitate extensive involvement from the disadvantaged sectors, they nevertheless failed to deal adequately with the fact that some sectors are better resourced than others. Given the developmental challenges that Tilley raises, it is indeed possible that the CA was never going to achieve its objective of giving preference to the disadvantaged sectors. One also has to take into account that some of the responsibility lies in the hands of civil society itself. The CA had hoped that civil society organisations would assist in bringing on board their wider constituencies. As pointed out above by some of the CA staff, not all civil society organisations took the advantage to participate, much less involve their members.

As we have seen in chapter 2, Habermas acknowledges that some groups in the public sphere gain more influence than others. What is important, according to Habermas, is that these groups have the capacity to "identify and thematize

latent problems of social integration which require political solution."²⁹² The "activated periphery" must then introduce these issues via "parliamentary (or judicial) sluices."²⁹³

From the comments from the stakeholders' quoted above, it appears that this dynamic between the centre and the "activated periphery" succeeded. Gxanyana points out that the workers on the factory floor are not able to raise and formulate issues in the same way that a person with technical training can. Organisations such as the Black Sash have close links to Advice Offices in grassroots communities. They are also part of a wide network of similar organisations. A Black Sash document titled "Campaign for Administrative Justice" illustrates this. The document states that "our 9 Advice Offices throughout the country have identified the right to administrative justice as being potentially the right that will most transform the lives of the people we assist." The document goes on to say that this issue should be included in the final constitution and "that we should campaign to this end." The Black Sash were thus able lobby issues arising from more disadvantaged civil society groupings. The LRC and NADEL was in a similar position. They mobilised disadvantaged community organisations such as the Homeless People's Association when they lobbied the CA to include socio-economic rights in the constitution.

The last days of the constitution-making process were characterised by intense political negotiations between the political parties in the CA, a great deal of the processes took place behind closed doors. Sarkin criticised the lack of transparency in this final stage of the constitution-making process. However, in terms of Habermas' theory, this is not entirely inappropriate. Habermas acknowledges that at some point in every political decision-making process there

²⁹²Habermas: *Between Facts and Norms* (1997), p. 358.

²⁹³ibid. p. 358.

has to be a level of "political bargaining."²⁹⁴ It would be difficult if not impossible to reach an agreement or a compromise in an environment that is completely constraint-free and accessible to everybody. Habermas concedes that political bargaining is by nature based on some form of instrumental rationality and strategic action.²⁹⁵ It is also important to note that even at this delicate stage of constitution-making, the premise of the CC including the chamber, were open to anyone who wished to access the politicians and influence the final outcome of the negotiations. Some organisation did indeed use this last opportunity to have their say in the new constitution of South Africa.²⁹⁶

4.7 CASE findings of the face-to-face component of the PPP

The PPP ran until February 1996. In a period of approximately twelve months, of which only seven months were available for operational use, the PPP, through its various mechanisms of the programme had sought to educate, to involve and to empower the public with respect to constitution and the constitution-making process.

The CA's statistics record that over 20 000 people attended the CPMs.²⁹⁷ Further, the CEP organised 181 workshops and 209 briefings. The total figure of people who were reached in the CEP, was 42 000.²⁹⁸ 1508 representative from civil society attended the hearings in the NSHP.²⁹⁹

²⁹⁴ibid. p. 167, p. 177, p. 283.

²⁹⁵ibid. 283.

²⁹⁶As an observer of these last stages of the constitution-making process, the writer did witness intense lobbying by stakeholders, which continued into the early hours of the morning.

²⁹⁷Constitutional Assembly Annual Report 1996: p. 49. The CA monitored and recorded the attendance at all its meetings, hearings, workshops and briefings.

²⁹⁸ibid. p. 49. See Appendix 4.

²⁹⁹ibid. p. 49. See Appendix 2.

In order to evaluate the PPP, CASE used various qualitative and quantitative research instruments to reach their findings. They interviewed people, organised focus groups, conducted interactive workshops and ran national sample surveys. The respondents represented a mix of race and gender, but with a particular emphasis on the disadvantaged communities that the CA had aimed to reach. After an analysis of sample surveys, interviews, focus groups and workshops, the final CASE report found that the process had been "successful".³⁰⁰ The report takes into account that the PPP had to be implemented within a very short time frame. In addition to this, it had to deal with issues that were abstract and extremely complex; the CA had to explain what a Constitution is, what Human Rights are and what the process of writing the Constitution entailed. Also, the PPP had to encourage people to participate by sending in submissions. CASE observes that the campaign did not have a single theme, such as the Voter Education campaigns of 1994.³⁰¹ Moreover, it had to be able to stimulate the public's interest *without* being biased and without making emotional statements about "pertinent issues". The report points out that due to the abstract nature of the process and the constitution itself, the PPP could not offer anything to the public in the short-term. The programme thus faced certain challenges in its effort to convince people that the constitution-making process had long-term advantages for South Africa as a whole. According to the report, the CA managed to reach three-quarters of the South African population.³⁰²

The final CASE report noted that the programme did not successfully reach rural women. This was due to traditional prejudices regarding politics - active

³⁰⁰CASE: "A New Constitution for a New South Africa. Evaluating the Constitutional Assembly", October 1996, p. 136.

³⁰¹Prior to the first democratic election in South Africa, a campaign that informed and educated people how to vote were conducted. This was to ensure that ballot papers were not spoilt due to errors by the new voters.

³⁰²CASE: "A New Constitution for a New South Africa. Evaluating the Constitutional Assembly", October 1996, p. 136. This finding takes into account all the mechanism used in the programme including the media.

participation in writing the constitution, was regarded as "men's business". CASE observed that this was particularly the case in patriarchal communities, thus constraining the CA in their rural activities such as the CEP and the CPMs.³⁰³ CASE noted that the CA was aware of this problem and had put considerable time and effort into ensuring that women's structures were widely consulted. CASE found nonetheless, that the programme did not reach the women grassroots communities sufficiently. CASE also found that men would dominate meetings. Holding more meetings would therefore not help to eliminate these gender imbalances. CASE suggested the development of specific mechanisms to allow women to participate in greater numbers.³⁰⁴ They recommended the use of civil society structures such as churches in participation campaigns aimed at reaching women: "Working with and through the churches, therefore, is one of the key means of accessing women in an environment in which they already operate and feel secure."³⁰⁵ In addition to the PPP's inadequacies to the participation of women, the report also noted that informal dwellers were not sufficiently taken on board. Because the CPMs and the CEP largely focused on rural disadvantaged, the poor, unemployed people living in urban informal settlements did not sufficiently have the opportunity to participate.

³⁰³ibid. p. 73.

³⁰⁴ibid. p. 73.

³⁰⁵ibid. p. 74. CASE's perception of churches as constraint-free environments lacks an understanding of the very values that underpin most churches. Churches and religious communities in general, are often seen to perpetuate the traditional gender imbalances that CASE describes above. Churches would therefore not have been an appropriate channels through which to access women. It is also important to note that churches and religious groups are members of civil society and as such , were invited to participate in the sector hearings, the CPMs and in the process in general.

4.8 The constitution-making process and the submissions

As discussed in chapter 2, Habermas points out that there does not have to be a contradiction between the opinion formation in the periphery and the will formation at the centre: "The communication structures of the public sphere relieve the public of the burden of decision-making, the postponed decisions are reserved for the institutionalised political process".³⁰⁶ However, the periphery must have the opportunity to influence and impact on the institutionalised decision-making process. In relation to the constitution-making process, this means that the submissions from civil society organisations in the public should have the power to influence the decision-making process in the CA.

The subject of enquiry of this thesis is not to establish whether, or to what extent the submissions had any impact in the constitution-making process and on the constitution itself. As Siri Gloppen pointed out - it is in fact "impossible" to establish to what extent the submissions influenced the process. In this thesis, the submissions are only important insofar as it "says" anything about the process in which the submissions were made. This section will therefore look at the submissions in relation to comments made by Siri Gloppen and Steven Friedman. Further, this section will briefly discuss the submissions in relation to Habermas' theory.

Friedman and Gloppen criticised the public participation approach of the CA. In their comments, they imply that the PPP was a marketing-exercise, and not genuine public participation. However, as pointed above, Gloppen concedes that it "is impossible to establish the precise extent to which the submissions from the public influenced the negotiation process and the content itself ... there were too

³⁰⁶Jürgen Habermas: *Between Facts and Norms* (1997) p. 361-362.

many interacting factors, too many possible patterns of influence."³⁰⁷ This notwithstanding, she goes on to say that:

"Submissions from organisations - particularly from central stakeholder organisations with links to political parties, and organisations with specialised knowledge of the matters under consideration - appear to have fed into the process in a meaningful way. These submissions cannot be dismissed as mere window-dressing"³⁰⁸

Gloppen observes that the civil society structures most actively involved in the process were human rights NGOs; "a category which in South Africa covers a wide range of non-governmental organisations that grew out of the political resistance of the apartheid years."³⁰⁹ Gloppen argues that the constitution-making process raised awareness of constitutionalism and democracy throughout civil society. Gloppen also acknowledges that the constitution-making process stimulated public debate. She states that although it would be difficult to establish whether this dialogue created a greater understanding of "the other", it at least had the potential to do so.³¹⁰ Further, Gloppen believes that the constitution-making process created a sense of ownership. Nevertheless, Gloppen's conclusion reflects scepticism about the process:

"The public participation strategy pursued(...)seems to have been successful in increasing the awareness of the constitution, and making people feel part of the constitution-making process(...)the public participation process was a case of going for the by-product, that is, to involve people primarily for the sake of enhancing the legitimacy of the product. This implies that people are fooled, which makes the apparent success of the strategy so surprising."³¹¹

³⁰⁷Siri Gloppen: *South Africa: The battle over the constitution* (1997), p. 260.

³⁰⁸ibid. p. 260.

³⁰⁹ibid. p. 263.

³¹⁰ibid. p. 263. Gloppen borrows the concept of "the other" from Sachs' justice model where he believes that a process of "participatory formulation of rights" is part of a rationale to enhance understanding and respect for other people's beliefs. This concept is also similar to Habermas' idea of a deliberative democracy.

³¹¹ibid. p. 266.

Her conclusion contradicts her other observations about the public participation process. As mentioned above, Gloppen believes that the constitution-making process raised awareness, stimulated debate and created a sense of ownership. Further, she argues that it is impossible to establish the impact of the submissions on the constitution, yet she goes on to say that submissions from certain stakeholders cannot be dismissed because they appeared to have "fed into the process in a meaningful way." It is therefore difficult to understand what criteria Gloppen uses when she concludes that people were "fooled" by the constitution-making process.

Friedman, in his article, "Don't be fooled by the illusion of public consultation" raises similar objections to the constitution-making process.³¹² He claimed that the public participation was not real and that the submissions were not taken seriously. "When they feel they need to share responsibility for decisions, ministries are wont to call large gatherings at which the citizenry are invited to 'give input'." He felt that the participants and the interest groups, did not get a proper opportunity to influence the constitution-writing process. For Friedman, the idea that more than two million submissions received by the CA, would shape the constitution, was nothing but a "farce": "While the assembly has parcelled out the processing of the submissions, legislators will take decisions after reading only a few or at best, edited summaries." He adds that the submissions in any event did not sufficiently represent the views of the public or the general public will. He also noted that because South Africa's illiteracy rate is high, the CA was not giving everybody an equal opportunity to participate.

Like Gloppen, he fails to establish any criteria for his critical view of the process. He also fails to motivate his conclusion. His article was written at the

³¹²*Business Day*: "Don't be fooled by the illusion of public consultation", 4 September 1995.

beginning of September 1995, approximately half-way through the constitution-making process. It would have been completely impossible for Friedman at that time to know anything about the outcome of the constitution-making process or to determine whether or not the submissions had any impact. He also shows that he is ill-informed about the process. As shown above, the CA did try to reach the marginalised and illiterate - citizens "who cannot write" at least had the opportunity to use other mechanisms when making their submissions.

The South African constitution-making process received 2 million submissions. It is quite conceivable that contentious issues would be raised without necessarily have an impact on the constitution itself. But would this have jeopardised the legitimacy and credibility of the PPP?

The wish of some Afrikaners for a Volkstaat, the role of the traditional leaders and the integration of customary law, the question of capital punishment and the abortion issue - these controversial issues reflect the political and cultural diversity of South Africa. How is it possible to reconcile all these, sometimes contradictory issues and produce one common law that has the respect of all?

The bid by some Afrikaners for a Volkstaat represents the views of a small minority of South Africans. However, it was seen as important to include these ideas, to create a dialogue with the leaders and to accommodate their ambitions. At the outset of the constitution-making process, a Volkstaat Council was established in order to deal with these issues.

"The Volkstaat Council is a body set up by Government in terms of Chapter 11 A of the Interim Constitution to enable proponents of the idea of a Volkstaat to pursue constitutionally the establishment of a Volkstaat."³¹³

Was it realistic to believe that such a Volkstaat would be accommodated within the constitutional framework of South Africa? It can be argued that

³¹³The Constitutional Assembly Annual Report 1996, p.32.

although the final constitution does not recognise an Afrikaner Volkstaat, the constitution-making process did accommodate the Afrikaners. In an article in the *Mail and Guardian* at the end of the constitution-making process, a spokesperson for the FF, Corne Mulder, confirmed that they were at least partly, accommodated in the new constitution.³¹⁴ The FF was satisfied that the constitution acknowledged collective rights, self-determination and that it would create a commission that protects the cultural rights of minorities. The FF was also pleased that the introduction of the final constitution did not end the life of the Volkstaat Council. This notwithstanding, the FF felt that they had to abstain from voting because of the education clause which "does not entrench Afrikaner single-medium schools." Accordingly, Mulder concluded that with their constituency in mind, they decided not to vote for the constitution.

Similarly, customary law and the recognition of traditional leaders were accommodated in the new constitution, but perhaps not to the extent that some traditional leaders had hoped for. The CA held a specific hearing to hear the views of traditional leaders. One can argue that chapter 12 of the constitution is a reflection of this hearing. This chapter in the constitution deals with traditional leaders and customary law. It recognises "the status and role of traditional leadership, according to customary law...subjected to the Constitution." Further, the constitution states that courts must apply customary law that is applicable, "subject to the constitution and any legislation that specifically deals with customary law." The constitution also mentions that national legislation *may* provide a role for traditional leadership "as an institution at local levels on matters affecting local communities." According to the constitution, national and provincial legislation *may* also establish houses of traditional leader and council of traditional leaders. Chapter 12 of the constitution can be interpreted as if the

³¹⁴*Mail and Guardian*, 10 May 1996. The FF was regarded as the "voice" within Parliament and the CA, for Afrikaners who wished to pursue their rights to an Afrikaner culture and language and the bid for securing a Volkstaat.

constitution-makers did accommodate the wishes as expressed by the traditional leaders. However, their rights are "subjected to" the constitution and accordingly traditional leaders may not have achieved the independence they might have wished for.

The proponents of the Volkstaat and the traditional leaders were recognised in the final constitution. In terms of Habermas¹ two-track model, it can therefore be argued that the final constitution reflected the views of the Volkstaat Council and the traditional leaders albeit not in its fullest sense. Despite the seeming "failure" of the bid to secure a Volkstaat or the "failure" to strengthen the position of the traditional leaders, the process had been open to take onboard the views of a minority. One can argue that this established a respect for "the other" which was important for the process as a whole.

Other controversial issues such as capital punishment and anti-abortion were raised and hotly debated during the constitution-making process. It appears that a majority of the public believed that capital punishment should not have been abolished and that abortion should have been prohibited. The pro-life and pro-death penalty petitions received in phase 1 and phase 2 of the PPP, strongly outnumber the ones of the opposite conviction.³¹⁵

Yet, the final constitution does not reflect the sentiment of the majority.³¹⁶ In this regard one has to consider the lobbying efforts by strong civil society stakeholders against such populist demands. In these cases, it would be probable that their views would carry more weight than that of the public petitions. As pointed out above, human rights NGOs were very active in the constitution-making process. Their active involvement throughout the process would have

³¹⁵The Constitutional Assembly Annual Report 1996, p.98.

³¹⁶A survey conducted by IDASA, found that 72 % favoured a total ban or very strict controls on abortion. Only 24 % supported more "liberal access" to abortion. IDASA Public Opinion Service, POS Report, No. 4, 1996: "Public Opinion and the New Constitution". The results in this report is based on a survey conducted in late 1995, of a "nationally representative sample" of 2674 South Africans.

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placed them in a stronger position to influence the constitution-makers. It must be noted that the ANC was divided on issues such as abortion. However, the "official position (was) that women should have the rights to choose."³¹⁷

Most of the 2 million submissions the CA received, were in the form of petitions. Less than 7 % of the total number of submissions were written individual submissions. 10 %, or 1440 of these were from civil society organisations. The remaining 11 768 submissions came from individuals. Overall, the issues that were petitioned did not seem to have a substantial impact on the final constitution. In this regard, it can be argued that there is a difference between signing a petition to support a certain position and actually writing a submission arguing ones point. Whereas the first option is trying to appeal to the decision-makers by using numbers, the second option is trying to convince the decision-makers of their position discursively.

The above mentioned apparent imbalance and contradiction between the general public and the public interest groups, do not, in terms of Habermas' theory, necessarily "threaten" the credibility and legitimacy of the CA's public participation efforts. As mentioned in chapter 2, Habermas argues that public interest organisations should formulate and identify social problems in the private sphere, and then attempt to influence the institutionalised decision-making centre. The abortion issue is an example which, it appears, was a social problem in the private sphere in South Africa. At the time of the constitution-making process, it was estimated that 300 000 women resorted to back street abortions per year. These abortions were illegal and often life threatening.³¹⁸

Habermas acknowledges that it is not practically feasible to take into account all shades of opinions in the final phase of decision-making. The channels of communication need to be open between the periphery and the

³¹⁷*Mail and Guardian*, 29 March - 3 April 1996.

³¹⁸Parliamentary Whip, 26 May 1995 (An IDASA publication).

centre, and the centre must be "porous" in order to be in a position to positively review the input from the civil society. According to Habermas, this is one of the criteria of a discursive lawmaking process.

An article in the *Mail and Guardian* published the week of the adoption of the constitution, argues that the ANC, as the majority party, should be recognised for its ability to make "concessions, to ensure that other political parties remained included in the process and by "bending" to the inputs "from lobbyists left and right on many issues in the Bill of Rights and elsewhere". The article suggests that this shows the ANC "to be just generous-spirited enough not to be typecast as a bully - even though it was the largest most aggressive boy in the playground."³¹⁹

Simone Chambers, uses Habermas' latest theory in analysing the Canadian constitution-making process. The Canadian federal government implemented a similar public participation programme to that of South Africa when drafting the new Canadian constitution. Regional theme conferences in which representatives from cultural communities, visible minority groups, the disabled, women, native Canadians, academics and "many other interested parties", were invited to participate. According to Chambers "this forum (...) was not only intended to give ordinary Canadians the opportunity and the public space to articulate their views on the future of Canada, it was also designed to foster discussion among diverse groups across the country."³²⁰ Chambers believes that Habermas is right "to say that bargaining has a place in democratic politics." According to Chambers, the final stages of the Canadian constitution-making process, participants were motivated to act strategically rather than discursively. However, she argues that, in terms of Habermas' theory, this did not jeopardise the overall public participation process. The "theme conferences" gave citizens the opportunity to deliberate and discuss in a constraint-free forum. This, she believes

³¹⁹*Mail and Guardian*: "ANC scores high points in the Constitution", 10 May 1996

³²⁰Chambers, p. 252.

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³¹⁹*Mail and Guardian*: "ANC scores high points in the Constitution", 10 May 1996

³²⁰Chambers, p. 252.

is important in itself, particularly with regard to fundamental issues such as constitutional principles.³²¹

The mechanisms used in the PPP facilitated a public space similar to the one Chambers describes above. In a country such as South Africa, characterised by a plurality of cultures and political convictions, and with a political past that had created deep divisions, this public space is in itself essential in order to create understanding for "the other" and to establish constitutional validity.

4.9 Concluding remarks

Habermas argues that communicative action is the solution to the tension that exists between facticity and validity.³²² Transferring this to the CA process, public participation can be seen as a mechanism for solving problems with regard to the complexities and abstractness of constitutional law. In order for law to be legitimate and accordingly enforceable, the law-making process needs to be discursive. Creating a constraint free environment where people can communicate, can be seen as an effort to legitimise the content of constitution. Thus, the validity of the discursive process ensures that the facticity of the "alienating" institutionalised decision-making process and the facticity of the law itself, have the necessary legitimacy. As mentioned above, the CA introduced several mechanisms in this regard.

The CA did not sufficiently reach its objective to give disadvantaged sectors equal opportunity to participate, despite the many mechanisms developed and deployed in this regard. Social realities made it difficult, if not possible to do this. In other words, they were bound to fall short of their ambitious objectives.

³²¹Simone Chambers: "Discourse and Democratic Practices" in *The Cambridge Companion to Habermas* (ed. Stephen White, 1995), p. 255.

³²²Jürgen Habermas: *Between Facts and Norms*, p.8.

However, their innovations such as the plain language initiative, the CEP and the CPM programme were of substantial value in that they introduced a new approach to lawmaking in South Africa. If these mechanisms are used in other law-making processes, the disadvantaged sectors will be further empowered and accordingly will be able to gain increasing influence in the public sphere.

This chapter has shown that sectoral interests had an opportunity to influence the process in a meaningful way. The stakeholders that were interviewed confirm this. As Gloppen argues, this raised the awareness of constitutionalism in civil society. Both Gloppen and Tilley mention that the constitution-making process also created a sense of ownership. In relation to Habermas' theory, the CA's emphasis on civil society in the public sphere is the right approach to discursive law-making. As indicated above, civil society structures that were situated near the CA and had human and financial resources to follow-up their submissions with lobbying, were in a far better position to influence the outcome. However, as shown above, this does not necessarily imply that these sectoral interests are powerful organisations that act strategically and with self-enriching motives. Sarkin, Tilley and Saldanha were all representing organisations that were promoting human rights. These civil society structures do not represent what are normally perceived to be "powerful interests". Based on the interviews conducted for this thesis, and on Gloppen's impressions, human rights NGOs were very active in the constitution-making process. In the new democratic order the "activated periphery" was accordingly in a position to be part of an opinion- and will formation process in a constructive manner and in a way that corresponds with Habermas' notion of the public sphere. That these organisations had access to, and were able to influence the constitution-making process is therefore an important factor in establishing the legitimacy of the PPP.

Indeed, the South African constitution-making process and the end product, the final constitution, have been regarded by other divided and wartorn African countries, as an example to follow. In an article about the Ugandan constitution-making process, James Katalikawe and Oliver Furley argue that South Africa "has by all accounts far exceeded Uganda's effort" in making a credible and legitimate constitution by genuinely involving the public in the process.³²³

George Kunda, chair of the Law Association of Zambia expressed his admiration for the South African constitution saying that nobody can take away from South Africa's achievement in this regard. "We could learn a lot, we who have contentious and divisive constitutions."³²⁴

³²³African Affairs (1997), Vol. 96: "Constitutional Reform in Uganda: The New Approach", p. 252. James Katalikawe is a senior lecturer in law. Oliver Furley is an honorary research fellow in the School of International Studies and Law at Coventry University.

³²⁴*Mail and Guardian*, October 22-28 1999.

5. MEDIA AND PUBLIC PARTICIPATION

5.1 Introduction

The media campaign aimed to create public awareness, as well as stimulating people to participate in the process. The campaign was intended to reach out to all South Africans, across gender, race, socio-economic differences, including both rural and urban population. In order to reach its objective, the campaign had to include various components.

Enoch Sithole, the Head of the Media Department, emphasised in his presentation to ComTask in September 1996 that the communication had to be participative and that it should provide a forum for public interaction. The department had to develop structures that were designed to involve people: "We could not employ earlier experiences; trying to reach the broader public was something that had never been done before in South Africa", he said.³²⁵ Further, he mentioned that the time frames were tight and "things already had to be done yesterday."

The MD sub-contracted an advertising agency to create a comprehensive advertising campaign for the constitution-making process. In the beginning of 1995, Hunt Lascaris was appointed to do the job, but Sithole pointed out that sub-contracting an advertising agency did not solve their problems - advertising agencies normally "sell" existing products. Sithole observed that it was a far more difficult and different task to sell something that did not exist like the Constitution because "the Constitution is an abstract concept". The campaign was intended to

³²⁵The ComTask was a commission mandated to form a proposal for the restructuring of government communication. They invited the CA administration to share their experience from the constitution-making process and give advice for future government communication. The hearing was held on 10 September 1996. Sithole's comments are based on his presentation in this hearing.

educate people and explain their role as participants in the constitution-making process. Further, to be able to contribute, the public needed to know *what* to contribute. The campaign was aimed to simplify the issues. It was also intended to make the public question what they saw on the billboards, and accordingly stimulate debate. Sithole notes that the CA had to make themselves available both in a passive and active way. The PPP and the supporting media campaign was according to Sithole, "confrontational communication - a completely new way of doing public participation in South Africa".

This chapter will examine the mechanisms deployed in the media campaign; the advertising, the various publications, the use of radio and TV and media liaison. The evaluations by Roots and CASE will give an indication of how the campaign was perceived by the public.

5.2 The CA's advertising campaign

In a media strategy document from the CA the department defined the constitution as the "character of a society and (which) reflects the values that inform it."³²⁶ According to this document, the act of making a democratic South African constitution was embedded in emotional and symbolic associations. "In South Africa's case, the new constitution celebrates the liberation from the apartheid past and a new sense of unity and purpose in nation-building. Equality, democracy and accountability are the cornerstones of this important blueprint for our national life".³²⁷ Thus the overall responsibility of the media department was "communicating a spirit of constitutionalism to the South African public in general and all organised areas of civil society."³²⁸

³²⁶Constitutional Assembly: Media Strategy 1996, p.1.

³²⁷ibid. p.1.

³²⁸ibid. p.1.

As pointed out in Chapter 4, the budget that was allocated the media campaign was a substantial part of the overall PPP budget. Out of approximately 31 million rands, more than 18 million rands were spent on advertising the process.³²⁹ In this regard, it is important to note that buying advertising space on TV, radio and newspapers is expensive and accordingly, the budget allocated to media does not necessarily reflect an imbalance between the face-to-face outreach component and the advertising of the process. In the interviews conducted by CASE, the CA staff pointed out that *if* budgets had to be cut, newspaper advertisements would probably be the first to go.³³⁰ According to the interviewees, advertising was very expensive, and "the audience did not include the marginalised people who were the chief target." Staff members at the CA compared newspaper advertisements with the CPMs. They said the latter was much cheaper, and "also more grassroots."

CASE research found that 39 % of the population never reads newspapers and 16 % read them daily. According to this survey, it is mainly African and rural dwellers who seldom or never read newspapers. Whites and Indians are groups that are mostly found to read newspapers daily. Only 11 % of Africans read newspapers every day. "Non-readers" are likely to be older people or poorly educated.³³¹

Earlier research by CASE provided a confirmation of the bias of mainstream media. According to this survey, the CA media campaign in the earlier period had generally reached more privileged audiences. It reached 71 % of those living in metropolitan areas, compared to 56 % in rural areas. Further, it reached 68 % of men, compared to 62 % of women. As mentioned above, age played a factor. It reached 77 % of 18 to 24 year olds, compared to 58 % of those aged 50 or more.

³²⁹See Appendix 1.

³³⁰CASE: "Public Participation Evaluation"(preliminary report), March 1996, p. 18.

³³¹CASE: "A New Constitution for a New South Africa. Evaluating the Constitutional Assembly", October 1996, p. 42.

The CASE report revealed some initial problems between the approach of the CA and Hunt Lascaris. The agency was not accustomed to place advertisements in all 11 languages. Further, the report points out that as a commercial organisation, the advertising agency was not aware of all the political sensitivities. However, as the process proceeded, Hunt Lascaris and the CA developed a good relationship, where the CA would brief the agency and the agency would suggest "messages".

The media campaign worked in conjunction with the rest of the PPP. Its work can therefore be divided into a pre-draft phase and a working draft phase. In the pre-draft phase, the advertising campaign were intended to raise public awareness about the unfolding process, to encourage people to send in submissions and to announce and publicise the CPMs. The pre-draft campaign was launched 15 January 1995. The CA used billboards, television, radio, national, regional and local newspapers to advertise the process as well as to create public awareness about the constitution-making process. The advertising campaign sought to link the constitution-making process to the historic elections in 1994. Several messages were developed in this regard: "You've made your mark, now have your say", "It's your Right to decide your Constitutional Rights", "Securing your right, securing your future" and "One law for one nation".³³² One of the first newspaper advertisements at the outset of the process, communicated the overall objective of the PPP: "The Constitutional Assembly is committed to a process of constitution-making which will involve the entire South African public".³³³ When CPMs were held in the provinces, the MD would be responsible for ensuring publicity by using local and regional media, posters and pamphlets. The advertisements were intended to have an educative and informative profile. They also tried to stimulate the public by asking questions regarding the constitution.

³³²Constitutional Assembly Annual Report 1996, p. 66-67.

³³³ Advertisement in *Mail & Guardian*, 6-12 January 1995, p. 13.

In one of the first "infomercials" in January 1995, the heading reads: "How to make history, a layman's guide."³³⁴ Under this heading a series of 7 explanatory steps follow. These explain how the CA worked, how to send in submissions and how these would be processed. As the constitution-making process developed, the work of the individual TCs was explained and the public was asked to respond to specific questions about constitutional issues. These questions were developed by the TCs for the Media department. In one advertisement, the TC of Judicial and legal system asks how judges should be appointed. In another advertisement, the TC on Fundamental Rights requests the public to make their input on what rights should be guaranteed in the constitution, whether the state had a right to limit these rights or whether anyone should be discriminated against on grounds such as race, gender and sexual orientation. Further, the readers were invited to submit their views on issues such as death penalty³³⁵ and affirmative action.³³⁶ Advertisements also asked what role traditional leaders should have in the new constitution and whether customary laws should be maintained in the new South Africa.³³⁷

In the working draft phase, the advertising campaign was divided in to three subcategories; the "submission phase", the "intermediary phase" and the "post-adoption" phase. The submission phase in the working draft period took place in January and February 1996. The advertising in this phase was designed to encourage the public to comment on the working draft of the constitution as well

³³⁴Advertisement in *Mail & Guardian*, January 20-26 1995, p.9.

³³⁵As shown above, capital punishment was one of the controversial issues in the constitution-making process. A conflict between the general public and certain sections of civil society and the decision-makers were evident. Whereas the popular view favoured capital punishment, many strong civil society organisations were against this on the basis of human rights. However, the advertisement shows that the CA did not try to avoid this issue, although it was, and still is a contentious issue in South Africa.

³³⁶Advertisement in *Mail & Guardian*, March 3-9 1995, p. 11.

³³⁷Advertisement in *Mail & Guardian*, April 21-27 1995, p. 5.

as building a message that the Constitution secures rights and freedoms. The adverts also reflected the gratitude of the CA to the public. One of the adverts read:

"A word of thanks for letting your voice be heard (...) By working together with you, we've received submissions on the New Constitution, debated them at length compiled and distributed a comprehensive Working Draft (...) We need to get your opinion on the Draft. So write to us at the Constitutional Assembly(...)Securing your rights. Securing your freedom."³³⁸

The MD, through their advertisements was responsible for ensuring that the public knew about the deadline for written submissions.

The second phase, called the "intermediary phase" was intended to be a count-down to the adoption of the constitution. This phase focused on the "participatory spirit" in which the constitution was made. The adverts also emphasised the content of the constitution. The CA Annual Report for 1996, mentioned that particularly socio-economic and political issues were focused on in this regard: "These issues were used to highlight the importance and meaning of the new Constitution to the South African people."³³⁹ The overall message was that the constitution would guarantee true democracy in South Africa. The final advertising phase was called "post-adoption phase". The CA advertisements in this phase were highlighting "the success and co-operation between the politicians and the people of South Africa".³⁴⁰ The ongoing campaign also educated the public about the content of the constitution as well as informing them where they could get a copy of the constitution.

In addition to the above-mentioned advertising campaign, the CA also had special campaigns in conjunction with days such as Freedom Day, 27 April 1995 and Human Rights Day, 21 March 1996. For Human Rights Day, a poster was

³³⁸Constitutional Assembly Annual Report 1996, p.67.

³³⁹ibid. p.69.

³⁴⁰ibid. p. 69.

produced and inserted into newspapers. The poster's message was: "Never Again!" - and its text was commemorating the Sharpeville massacre and explaining the Bill of Rights in the new constitution.³⁴¹

5.3 The use of television and radio in the media campaign

The CA Annual Report for 1996 explains that:

"The objective of the radio and television programmes organised by the Constitutional Assembly was to provide a platform where the members of the CA could interact with the public and civil society structures on current issues being debated in the various CA committees."³⁴²

The CA launched a weekly television programme called "Constitutional Talk". This programme ran from 24 April until 10 October 1995 in the pre-draft phase, and 18 February to 12 May 1996 in the working draft phase. In 1995 and 1996, a total of 37 "Constitutional Talk" programmes were aired on two of SABC's channels, CCV and NNTV.³⁴³ The programme was hosted by law professors Dennis Davis and Mandla Mchunu and lawyer Urmilla Bhoola. Members from various civil society structures and organisations participated in the programme and engaged in discussion with panels of CA politicians. The issues that were debated included the bill of rights, separation of powers, national anthem and flag, freedom of expression, traditional authorities and the death penalty.³⁴⁴ The topics reflected the issues of the TC debates. Sithole believed that the Constitutional Talk programmes would also be a way for the public to participate: "By watching the

³⁴¹ibid. p. 73

³⁴²ibid. p.70.

³⁴³The South African Broadcasting Corporation (SABC) is a national South African broadcasting Service. CCV and NNTV are two of the channels that belong to the SABC.

³⁴⁴Constitutional Assembly Annual Report 1996, p.71.

debates, people would at least passively participate. In the CA programmes, difficult issues would be simplified, and the public would be able to watch different political parties as well as civil society stakeholders reflecting their views."³⁴⁵

According to CASE research, only 44 % of the population watches TV everyday and 27 % never does. 46 % of Africans never watches TV. In general, the research found that Africans, informal rural dwellers, older people and lower educated respondents watch TV far less frequently than other groups.³⁴⁶ CASE emphasises that this poses serious problems for all those who wish to convey a message to the disadvantaged sectors of society by using TV.

With this in mind, CASE evaluated the Constitutional Talk programme. It found that 34 % of TV viewers recalled having seen the Constitutional Talk programme. According to CASE this was a "considerable achievement for a fairly "highbrow" programme which had far from ideal flighting times." Further, the report found that 19 % more Africans (39 %) than whites (20 %) watched the programme. It also found that 10 % more men (39 %) than women (29 %) had seen part of the series.³⁴⁷ Of those who had seen Constitutional Talk, 70 % "liked it." 85 % of rural dwellers, "liked it very much". The CASE report comments that this was "very positive for the producers and the CA." However, the research shows that only 33 % of whites liked it.³⁴⁸

Radio programmes were also broadcasted throughout the country, on eight different radio stations in eight different languages. The purpose of the radio programmes was to reach ordinary people. The CA Annual Report of 1996 noted that "radio was identified as an effective delivery mechanism to reach the people

³⁴⁵Presentation by Enoch Sithole at ComTask Hearing, 10 September 1996.

³⁴⁶CASE: "A New Constitution for a New South Africa. Evaluating the Constitutional Assembly.", pp. 16-17.

³⁴⁷ibid. p. 30.

³⁴⁸ibid. p. 32.

in both rural and urban areas."³⁴⁹ The programmes were produced in co-operation with the SABC Educational Directorate and they were broadcast weekly. The radio programmes were constitutional education radio talk-shows, where constitutional experts from the CA and various academic institutions would be guests and where ordinary people would get an opportunity to phone in. Occasionally, CEP co-ordinators would be interviewed. The co-ordinator would explain the aims of the CEP, give details about the workshop programme and how people could get involved. He or she would also give the latest update on the constitution-making process.³⁵⁰ The programme had the potential to reach more than 10 million listeners,³⁵¹ and was therefore seen as an important tool in the PPP.

In terms of radio listenership, the CASE report found that more than half (52 %) of all South Africans listen to the radio often, and a third (33 %) seldom or never listen to the radio.³⁵² However, 82 % of the population over the age of 18 listen to the radio "some of time."³⁵³ According to the CASE findings, the difference between the races, sexes, and across different ages and areas, are much smaller for radio listenership than that of TV viewing. However, whites tend to listen to radio more frequently. 69 % of white respondents listen to the radio everyday, while 50 % of their African counterparts do the same. Also, the report found that slightly more women (3 %) than men listen to the radio daily.³⁵⁴ As in print and TV, the frequency of radio listenership are less among those who have little or no education.

³⁴⁹Constitutional Assembly Annual Report 1996, p. 71.

³⁵⁰CA document - transcript from Radio Teemaneng, interview with co-ordinator Joe Ngubo, 16 November 1995.

³⁵¹The figure is based on the various radio stations listenership.

³⁵²CASE: "A New Constitution for a New South Africa. Evaluating the Constitutional Assembly", October 1996, p. 32.

³⁵³ibid. p. 36.

³⁵⁴ibid. p. 33.

In terms of the CA' s radio campaign, 38 % of radio listeners had heard the radio advertisement. Of these, 70 % "liked it", 25 % thought it was "OK" and 5 % "disliked it." Again, whites liked it less than other groups. 26 % of whites said they did not like it, compared to only 3 % of Africans.³⁵⁵ 74 % of those who had heard the radio advertisement said they "learnt a lot from it." The CASE report found that 44 % of the respondents said they had heard radio programmes with a constitutional content. According to the CASE report, there was relative little difference between the races and different areas. However, the results suggest that younger, better educated respondents listened to the radio more than older, under-educated people, and accordingly, had heard the CA radio programme more often.³⁵⁶

5.4 The CA Newsletter and other CA publications

The CA produced a newsletter called "Constitutional Talk". The newsletter was intended to provide detailed information to the public in an educative way. All 11 official languages were used in the publication. "Constitutional Talk" was produced fortnightly and distributed to 160 000 people, of whom 60 000 were subscribers. The CA used taxi ranks throughout the country to distribute the remaining 100,000 copies. Using "black taxis" was seen as an innovative means of distribution.³⁵⁷ By employing this unconventional form of distribution, the CA believed it was able to reach segments of society that would otherwise be excluded from the process.³⁵⁸ In addition to this, the CA would from time to time insert the newsletter into newspapers. This was done when the CA believed that the process had reached a

³⁵⁵ *ibid.* p. 40.

³⁵⁶ *ibid.* p. 37.

³⁵⁷ Black Taxis are mini buses that are used for public transport. It is one of the most common means of transport for people who live in townships.

³⁵⁸ Enoch Sithole, Comtask Hearing, 10 September 1996.

particularly significant juncture. According to the CA Annual Report of 1996, three special issues were printed.³⁵⁹ At the start of the constitution-making process in January 1995, the edition of the newsletter explained how the CA worked, the deadlines and how the public could participate in the process. The second special edition was printed in November and December 1995, when the Working Draft of the new constitution had been produced. This issue of "Constitutional Talk" included the text of the Working Draft and it was published in all 11 official languages.³⁶⁰ Finally, the CA produced a special publication after the adoption of the constitution.

According to CASE research, at the end of the process, 20 % of the respondents had seen the Constitutional Talk newsletter. This was a 5 % increase in circulation over the figures in the 1995 survey. The report also found that more Africans (22 %) than other groups had seen it. Further, the report shows that more men (24 %) than women had seen it. In rural areas the exposure was lower than other areas. 24 % in metropolitan areas, 22 % of urban dwellers, 23 % of informal dwellers and 14 % of rural dwellers had seen it. Almost two-thirds (63 %) of those who had seen the Constitutional Talk Newsletter, said they had learnt something from it.³⁶¹

The MD was also involved in producing the educational material for the PPP, such as the booklet "You and Building the new Constitution" and comic strips for the Constitutional Talk newsletter which "explained various complex issues in an accessible and user-friendly manner."³⁶²

In addition to the above mentioned publications, the CA also established a web site. In an article in the *Mail & Guardian* under the headline "South Africa

³⁵⁹Constitutional Assembly Annual Report 1996, p.72.

³⁶⁰5 millions copies were distributed according to the CA Annual Report 1996.

³⁶¹CASE: "A New Constitution for a New South Africa. Evaluating the Constitutional Assembly", October 1996, p. 49.

³⁶²Constitutional Assembly Annual Report 1996, p. 73. See chapter 4, section 4.4.1.

gets a cyber-constitution", the journalist writes that South African "constitution-makers have hitched a ride on the information superhighway".³⁶³ The article quotes CA executive director Hassen Ebrahim saying that the service will contribute to making the process "the most open and transparent in the history of democracy". All the official documents relating to the new constitution were available on-line as well as the submissions received from the public.

In one of the interviews conducted by CASE, Hassen Ebrahim suggested that the budget for the internet component of the programme could have been cut if financial circumstances made it necessary. Ebrahim admitted that internet was a special interest of his, "in that he always wanted to use technology for development." However, he knew that this communication mechanism would, in the South African context, only reach a limited "élite" audience.³⁶⁴

According to CASE, the CA website, in the first period, recorded more than 100 logins per day. A random login in early February 1996 revealed that there had been approximately 600 logins the previous day.³⁶⁵

5.5 Media Liaison

In the spirit of the CA's guiding principles of "accessibility" and "transparency", it needed to create a good relationship with both the general public and the media. The CA therefore, set up a Media Liaison/Public Relation office. This office was in charge of developing a communication channel between the public and the CA. The communication channel acted as an information centre, and according to the CA, sometimes more than 500 calls per day were handled.³⁶⁶ In addition to this,

³⁶³*Mail & Guardian*, May 19-25, p. 10.

³⁶⁴CASE: "Public Participation Evaluation" (preliminary report), March 1996, p. 18.

³⁶⁵*ibid.* p. 11.

³⁶⁶Constitutional Assembly Annual Report 1996, p. 69.

Media Liaison was responsible for press releases and information bulletins, press briefings for international, national and local media.

The CA also ran a "Constitutional Talk-line". This was devised to enable the public to communicate directly with the CA and to get a current briefing on political discussions. Callers were able to leave messages requesting information or record their comments. The Constitutional Talk Line was available in five languages; English, Afrikaans, Xhosa, Tswana and Zulu.

The CA advertised the Constitutional Talk Line by using a photograph of President Nelson Mandela. In this advertisement, Mandela is seen speaking on a cellular phone and the "talk -bubble" says: "Hello? Is that the Constitutional Talk Line? I would like to make my submission."³⁶⁷ According to CASE, by mid-January 1996, 9500 calls had been received by the CA. Those who phoned in were asked to state their language preference. 58 % chose English, 16 % wished to speak in Afrikaans, 11 % in Tswana, 8 % spoke Zulu and 7 % preferred Xhosa.³⁶⁸

5.6 The last stages of the constitution-making process

In the pre-draft phase, the CA's media campaign had intended to educate the public about the constitution-making process and to "stimulate" them to participate in the process. After they had received submissions and the working draft of the constitution was developed, the CA had to "advertise" the draft. According to a media strategy from the CA in 1996, the underlying objectives of the last stages of the process, were to produce and distribute 10 million copies of the constitution in various forms in all 11 languages. The document also stated that the strategy had to ensure that the constitution was "accessible to the majority of South Africans through various media, and to promote an understanding of its

³⁶⁷ibid. p. 69.

³⁶⁸CASE: "Public Participation Evaluation"(preliminary report), March 1996, , p. 11.

content and the recourse they have in terms of the New Constitution".³⁶⁹ The document also emphasised the importance of developing a culture of constitutionalism, "so that the Constitution takes a rightful place at the centre of our national life."³⁷⁰

The target audience of the campaign, according to the above mentioned document, stretched across various groups in South Africa. The campaign aimed to reach both illiterate people who relied on non-print media for information and literate people who needed the constitutional messages conveyed in simple terms. Children at the primary school level, youth at the high school level and tertiary level, were targeted. In addition to this, the document mentioned that educated South Africans, who would be able to understand complex media and who had access to technological media, should be reached.³⁷¹

The CA chose several avenues in order to achieve these above mentioned objectives and to reach the above mentioned primary targets. Multi-media, electronic media, the use of video and internet were some of the mechanisms used in the process. The CA also made use of government departments, local and provincial government, the SABC, NGOs, the formal sector and the library services. As already mentioned, the process was divided in three phases. The first phase, from January 1996 to the end of February 1996 was the period of the constitution-making process that was characterised by public involvement and constitutional negotiations. This "submission phase" has been mentioned above in section 5.2 where the advertising campaign was outlined. The MD were responsible for conveying to the public the issues which were discussed and negotiated in the TCs. In this regard, the Constitutional Talk newsletter was seen as an important information channel. Media liaison had to keep the public informed

³⁶⁹Constitutional Assembly 1996: Media Strategy, p 1.

³⁷⁰ibid. p.1.

³⁷¹ibid. p.1.

by holding press conferences and through the general mass media, covering the process which was "unfolding at the CA".

The second phase of the campaign took place from March to the adoption in May 1996. This was the period when the final negotiations occurred and when the CA finally reached consensus regarding the content of the constitution. To inform the public about these developments, the advertising in this period focused on the content of the constitution and what this meant for the people of South Africa.³⁷²

The CA also had to prepare for the adoption celebration on 8 May. This was the third and last phase of the MD's work. The Department code named this event "The Big Bang". According to the media strategy for 1996, the adoption and signing of the new constitution was characterised as being "a milestone in South African history and an event that will surpass even the presidential inauguration in its symbolism and significance".³⁷³ Accordingly, the MD planned and implemented, together with the rest of the CA, a big celebration. The event was broadcast live, a concert took place outside Parliament and the public were able to follow the CA proceedings from outside the Parliament. President Nelson Mandela also addressed the public after the adoption of the constitution had taken place.³⁷⁴

The CA also placed newspaper advertisements on the adoption day. The advertisements emphasised the inclusive and participatory nature of the process. The new constitution, the advertisement reads, "was made by a team of 43 million people". The advertisement also refer to the constitution as an important means to unity:

"We are all quite different, but we also have a lot in common. Now there's something new that we all share. Something that makes us a great nation. Our new constitution will be adopted

³⁷²See section 5.2.

³⁷³Constitutional Assembly 1996: Media Strategy, p. 5.

³⁷⁴Although consensus had been reached in the CA, the constitution still had to go to the Constitutional Court to ensure that the CA had complied with the 34 Constitutional Principles. The final constitution was not signed before December 1996.

today, and submitted to the Constitutional Court for certification. Written by the people of South Africa, it's going to protect us all and unite us. It's one law for one nation. It's ours."³⁷⁵

Five million copies of the new constitution were being published in a pocket-sized format and five million copies of a simplified version of the bill of rights were produced. The CA also made a comic version of the new constitution in order to make the content comprehensible and interesting for the general public.

5.7 The Evaluation of the Media Campaign

Evaluations of the various mechanisms of the Media Campaign took place at various times during the process. Some of these findings have already been quoted above. CASE and Roots Marketing and Research SA, held focus group discussions and run surveys in order to establish the impact and reach of the media campaign. The CA believed that the best way of discovering weaknesses was to ask the public. If the public did not understand the message that was conveyed to them, then the message had to change. Further, if the public had never heard the message, then the CA had to find new ways of reaching them. The first study was executed by Roots in April 1995. The research entailed a qualitative analysis of the content of the media campaign at that time. The media campaign had only been launched 3 months before.

The Roots report shows that there was a great deal of confusion about where the CA campaign fitted in with respect to other campaigns like the Masakhane campaign that was being implemented at the same time. Many of the respondents quoted the Masakhane campaign and the local government election campaign

³⁷⁵*Mail and Guardian*, May 10 1996. Under the text, there is photographs of South Africans representing the ethnic, the racial and the religious plurality of South Africa.

when asked about the CA advertisements. In general, it seemed as if very few claimed to have seen the CA advertisements at all. Roots concluded that the advertising campaign had not really had any impact thus far. However, on a more positive note - Roots observed that the respondents understood the content when they were confronted with the various messages from the advertising campaign. They also responded positively to the inclusive nature of the process. This notwithstanding, the study pointed out that the campaign did not sufficiently motivate the public to participate in the process.³⁷⁶

The TV and radio commercials showed a similar tendency in the Roots study. Only white, Indian and a few urban black people claimed to have seen the commercials. The comments from the respondents who had seen the commercial were mixed: "They are trying to look for excuses, so that in a few years time they can say, you see, we drew the constitution and you had all the opportunity to say something but you didn't." Or more positive: "The fact that they say that you have a say, makes you feel patriotic....it's good to know that I could have had my say".³⁷⁷

The first evaluations conducted by Roots and CASE had two distinct foci. Whereas Roots conducted qualitative research, focusing on the *impact* of the campaign, the quantitative research conducted by CASE aimed to find what *reach* the campaign had had thus far. The Roots study shows that the impact of the campaign had not yet been successful. On the other hand, CASE found that the CA had managed to reach a substantial number of South Africans. CASE found that the campaign in May 1995, after only a few months of running, *did have* a fairly high penetration and impact - CASE reported that the media campaign had reached 65 % of all adult South African. ³⁷⁸

³⁷⁶Roots Marketing and Research SA: "The New Constitution. Research Findings", 17 May 1995, pp. 30-32.

³⁷⁷ibid. pp. 35-37.

³⁷⁸CASE: "A New Constitution for a new South Africa. Evaluating the Constitutional Assembly. Survey Report" October 1996, p. 8.

The above mentioned findings from the Roots study gave the CA an opportunity to change the campaign and to convey a clearer message to the public. According to CASE, the CA had increased its media exposure a year after the launch. The CA media campaign as a whole had reached 73 % of all adult South Africans which translated into more than 18,5 million people. CASE found that women in general had considerably lower exposure than men.³⁷⁹ The overall impact of the media campaign also gives a positive account of the campaign. 57% of the 73 % of the respondents who were exposed to the CA materials, believed that the campaign had increased their knowledge, and 28% said that they had learnt a lot.³⁸⁰ Furthermore, the report noted a relative success among rural dwellers: 59% reported that their knowledge had increased, compared to 53% in small towns, 56% in informal settlements and 58% in metropolitan areas.³⁸¹ The white and coloureds responded more negatively to the question of the impact of knowledge than their African and Indian counterparts. According to the report, there could be two reasons for this: They were insecure about the political changes that were taking place in South Africa or alternatively, they had a higher level of education and thus felt that they had less to learn.

In his presentation to the ComTask hearing in September 1996, Dr David Everatt, executive director of CASE, noted that the reports reflected the historical socio-economic differences in South Africa. The historically disadvantaged were difficult to reach by conventional mainstream "above-the-line media".³⁸² This was due to the fact that they did not have TVs, the level of education was low and

³⁷⁹ibid. p. 10.

³⁸⁰ibid. p. 58.

³⁸¹ibid. p. 58.

³⁸²Advertising in conventional media channels such as radio, tv and newspapers are regarded as "above-the-line media". "Below-the-line media" uses other channels to reach the public. The CA's use of taxi ranks to distribute the Constitutional Talk Newsletter is an example of below-the-line media. Distribution of pamphlets, using bill boards, posters and buses for advertising is also regarded as such.

they did not read newspapers. Everatt emphasised that similar campaigns in the future had to be aware of the obvious socio-political problems with mainstream media "in an inclusive South Africa". According to Everatt, the media campaign was least successful in reaching older rural women. The CASE reports show that there was a very strong gender difference particularly with regard to newspaper advertisements: "Newspapers are a male form of accessing news" observed Everatt. He further noted that CA radio adverts and programmes, showed a lesser degree of gender difference. Thus Everatt pointed out that: "Radio is an important means to get through to women."

Everatt comments that the research findings show that there was a racial difference, based on attitudes rather than access. "The whites could switch off because they felt threatened by the whole process" Everatt said. He concluded by saying that using mainstream media created a "big hitline", but he cautioned that it was essential to educate the public in order to make them participate. Everatt maintains that these were crucial elements in the CA's PPP: "it was important to make people feel important, and not leave it to the politicians to decide".

5.8 Habermas and the role of media in opinion and will formation

In Habermas' earlier work, most notably in *The Structural Transformation of the Public Sphere*, he displays a critical attitude towards the false consciousness of the media steered mass-consumption society. As mentioned in chapter 2, the Frankfurt School was highly critical of the mass-consumption society that developed after World War 2. In this regard, media and advertising were seen as instruments of capitalism, used to manipulate citizens. Habermas formulates a similar attack on mass culture in *The Structural Transformation of the Public Sphere*. Here, Habermas maintains that the public sphere has transformed into an arena for advertising rather than a setting for rational-critical debate. In this regard,

Habermas argues that publicity loses its critical function in favour of staged displays.³⁸³ According to Habermas, even states address citizens as consumers when they seek to develop legitimacy. This form of legitimacy is not developed by responding to an independent and critical public. Rather, it is seeking to persuade the masses of its "product". Habermas argues that the consequence of such a mass-consumption mentality, is the establishment of "representative publicity".³⁸⁴ In this regard, the public can only respond by acclamation, or by withholding acclamation. Accordingly, this mass-consumption mentality has significant elements of false consciousness, where citizens in the public sphere perceive themselves as something they are not; namely members of a democratic public.

The arguments formulated in *The Structural Transformation of the Public Sphere* were further developed in *Legitimation Crisis*, where Habermas presents an even a bleaker picture of the capitalist state. However, in his more recent work, this criticism is moderated slightly. It must also be noted that these issues are not the main focus of Habermas' *Between Facts and Norms*. In his latest work, Habermas indicates that the role of the media is an important mechanism in the communication between the centre and the periphery of decision-making. The media can act as a place where the public sphere can find an outlet for the views and opinions of the private sphere. Civil society, made up of organisations and voluntary associations, represents the periphery. The mass media in this regard, provides a channel where the periphery gets the opportunity to influence central decision-making structures.

Habermas recognises the power of the mass media in contemporary society. According to Habermas, the mass media can be seen as the "fourth branch of government".³⁸⁵ Similarly to the argument formulated in *The Structural*

³⁸³Jürgen Habermas: *The Structural Transformation of the Public Sphere* (1991), p. 206.

³⁸⁴*ibid.* p. 221.

³⁸⁵Jürgen Habermas: *Between Facts and Norms* (1997), p.376.

Transformation of the Public Sphere, Habermas argues in his latest work that in a media dictated society, the agenda of the mass media is often set by powerful political structures or other privileged groups. This results in a situation where actors operating outside large political structures have less opportunity to influence the media.

"The mass media must be kept free from the pressure of political and other functional élites, they must be capable of raising and maintaining the discursive level of public opinion formation without constraining the communicative freedom of critical audiences."³⁸⁶

In order for the media to be a useful tool in opinion-and will formation, Habermas maintains that the periphery should take the initiative in agenda-setting, thus becoming an important force to be reckoned with.

There are three forms of agenda setting in Habermas' analysis of mass media: Inside access model, mobilisation model and outside initiative model.³⁸⁷ In the first model, initiatives come from powerful political players and office holders and the issues only circulate within the political realm, thus excluding the broader public's opportunity to participate or influence the process. The "mobilisation model" also starts inside a political system, but contrary to the "inside access model" needs the public sphere for support: "An initiative starting within the political system, but the proponents of the issue must mobilise the public sphere, because they need to obtain formal consideration in order to implement an adopted programme successfully."³⁸⁸ As indicated above, Habermas is critical of public communication starting in the centre, and not in the periphery. The third model he presents, the "outside initiative model" fulfils,

³⁸⁶ibid. p. 442.

³⁸⁷ibid. p. 379-380. Habermas is using the terminology of Cobb, Ross and Ross, in their analysis of various communication models ("Agenda Building as a Comparative Political Process").

³⁸⁸ibid. p. 380.

according to Habermas, the important criteria for a healthy communication flow in terms of agenda setting. In this model it is the periphery who is responsible for the agenda-setting in media.

The objectives of the media campaign was to stimulate and create constitutional awareness and public participation in a political process. According to Habermas' models, the media campaign of the CA could be characterised as a "mobilisation model". The campaign aimed to mobilise people in order to get inputs in the process.

The media initiative started in the centre, by setting an agenda for what was expected from the public. The CA aimed to mobilise support and participation in the periphery for a multi-party political programme. In Habermas' view, this is not healthy in terms of communicative action. One can argue however, that because of the nature of the process and the context in which it had to operate, it would have been difficult to rely on the periphery to set the agenda. Further, the CA media initiative can also be seen as a form of "healthy" stimulation of civil society. The CA opened the doors for civil society in the public sphere to take the initiative for further agenda setting and discussions, thus creating an environment where "outside initiative" could take place.

However, the media campaign's focus on "passive participation"³⁸⁹ as well as the acknowledgement of the need to "make people feel important"³⁹⁰, suggest some obvious deficiencies with regard to the understanding of active and genuine participation. The CA's advertising campaign displays characteristics comparable to that of the sale of a commodity. The use of an advertising agency, underlines this point. In addition, the CA's media liaison role in the process, indicates a desire to control and manipulate influence, rather than creating a sphere where constraint-free opinion formation could take place.

³⁸⁹See section 5.3 in this chapter (Enoch Sithole's comment).

³⁹⁰See section 5.7 in this chapter (David Everatt's comment).

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³⁸⁹See section 5.3 in this chapter (Enoch Sithole's comment).

³⁹⁰See section 5.7 in this chapter (David Everatt's comment).

Further, the process was dependent on extensive media coverage and advertising in order stress the legitimacy of the process. The CA needed to *display* that the PPP contained the right elements such as inclusivity and ownership. Accordingly, the CA seemed to be aware of the importance of the power of media in enhancing the "credibility", "transparency" and "legitimacy" of the process. This approach indicates that the CA, at least partly, was motivated strategically and instrumentally in the implementation of the extensive media campaign. However, it is also important to bear in mind that a public issue campaign like the CA organised, can have a very important educative function. One political member of the CA expressed it in this way: "The media needs to be seen, once and for all, as an educator with tremendous outreach potential to the public"³⁹¹ In this regard, the public were perceived to be both passive recipients of a continual information flow from the "centre" and active participants in the CA process.

In order to achieve the above-mentioned objectives, the CA's media campaign had to rely on the mass media in order to inform the public. Habermas, however, points out that the importance of "the diffusion of information and points of view via effective broadcasting media"³⁹² must not be overemphasised in a public communication process. Habermas accepts that the media has the ability to arouse public interest and participation because it has a broad circulation and its messages are often "attention grabbing". This, according to Habermas, does not suffice. He argues that there has to be a parallel process where opinion formation can take place. "The rules of shared practises of communication are of greater significance for structuring public opinion."³⁹³

Seen in the context of the South African constitution-making process, Habermas' view of the media's role, provides an understanding of the relationship

³⁹¹J.Y. Love, Constitutional Assembly 15 August 1994 (Quote from the CA Annual Report 1996, p. 65).

³⁹²Jürgen Habermas: *Between Facts and Norms* (1997), p.362.

³⁹³*ibid.* p.362.

that existed between media campaign and the face-to-face outreach components of the CA's programme. In this regard, the media campaign was educative. Further, it stimulated public participation in the constitution-making process. The media campaign could therefore only play a supporting role to the various public participation mechanisms used in the programme.

In *The Structural Transformation of the Public Sphere*, Habermas conceded that there exists a tension in "modern propaganda". The "Janus face of modern propaganda" is characterised by the tension between enlightenment and control, between information and advertising and between pedagogy and manipulation.³⁹⁴ The face-to-face component of the PPP can be seen, to some extent, to solve the tension of the Janus-faced modern propaganda Habermas describes. By giving the public an opportunity to participate in the process, and be part of opinion-and will formation, the CA engaged in a two-way communications process. However, there can be little doubt that the CA's media campaign also displayed the negative tension in modern propaganda as described above. Using advertising and slogans, the CA did not only "sell" the constitution-making process and the constitution itself, it also attempted to legitimise the new political order by appealing to the citizenry through conventional mass-consumption channels. This chapter has shown that considerable resources were used in the media campaign. It can be argued that the CA's, at least to some extent perceived the public as passive and uncritical recipients of nicely-clad messages. Using an advertising agency to "sell" their product as Enoch Sithole expressed it, reduced South Africans to consumers rather than regarding them as rational social agents in the public sphere.

These criticisms notwithstanding, the CA's media campaign cannot be reduced to a cynical exercise of manipulation, control and propaganda. The CA also

³⁹⁴Jürgen Habermas: *The Structural Transformation of the Public Sphere* (1991), p. 203.

produced and implemented an important public issue campaign where the objective was to genuinely inform, enlighten and teach the public about the constitution-making process, the constitution, and also to invite the public to actively take part in the constitution-making process.

6. CONCLUSION

The tension between facticity and validity is central to Habermas' model of discursive lawmaking. Habermas' understanding of the tension between facticity and validity shows that law faces certain challenges in modern democratic societies. To be legitimately enforced, law depends on the acceptability of the legal addressees. The coercive implications of law necessitate that the public participates in lawmaking processes. In this way, citizens will understand themselves as the authors of the laws that they are subjected to. This tension was particularly acute in the apartheid legal system, where law did not have validity, and the majority of South Africans had no way of "legally" influencing the decision-makers. Post-apartheid South Africa is made up of a complex web of social relationships - defined by pluralism and a lack of homogeneity. According to Habermas, such a lack of shared traditions places further strain on the tension between facticity and validity. Did the CA understand this tension? Did the CA apply the appropriate discursive mechanisms in order to deal with this tension?

According to Habermas, the tension between facticity and validity can only be solved through discursive law making processes. This entails involving the public sphere in a process of opinion and will formation in the formulation of new laws. Habermas argues that civil society, in a discursive manner and by using their communicative freedom and power, must be given the opportunity to influence the decision-making process. This process is also a means to create an understanding of the issues, and the viewpoints and positions of others. The deliberation thus becomes educative and a space is created for tolerance of opposite convictions. Further, in order to prevent deliberation from becoming élitist, Habermas emphasises the need to use ordinary language - the language found in the lifeworld.

In terms of Habermas' theory, the PPP was an ideal mechanism for the implementation of a discursive law making process. As shown in the previous chapters, the CA demonstrated an implicit understanding of the tension that exists between the centre and the periphery in lawmaking processes (external tension), and the tension between the facticity and the validity of law itself. Further, the CA showed a commitment to deal with these tensions. The depth, scope and range of meetings, hearings, workshops and other interactions of the PPP, and the high proportion of human and financial resources dedicated to the PPP, reflect a well planned and executed process of two-track communication between the decision-makers and the periphery.

In terms of Habermas' theory, the CA's strategy of "reach the people who reach the people" was the correct approach. Stronger civil society structures in the public sphere, such as public interest groups like the Black Sash and NADEL, can identify and formulate the social problems and experiences in the private sphere. They have gained influence in the public sphere, and they have the resources, both in human and financial terms to follow-up the issues they thematise and identify. These organisations are, accordingly, in a strong position to have an impact in the institutionalised will formation process. Representatives of these organisations have shown that the CA was accessible and that the submissions from their organisations were taken seriously by the CA. As shown in this thesis, these civil society stakeholders worked with their members on the ground and less resourced organisations. This demonstrates that they included the broader public sphere in the opinion-and will formation. In the new democratic order, the "activated periphery" was accordingly able to play an influential and meaningful role in an opinion and will formation process that corresponds with Habermas' notion of the public sphere. The access enjoyed by these public interest groups, and their influence in the constitution-making process is

evidence that one of the central criteria for determining the legitimacy of the PPP was satisfied.

Habermas acknowledges that some civil society groups have more influence in the public sphere. However, this does not imply that civil society structures can be excluded from a discursive lawmaking process. The CA gave the previously disadvantaged sectors an opportunity to participate in a process they would otherwise have been excluded from. The CA also used plain language in order to make the process more accessible to the disadvantaged sectors. The plain language initiative, the CEP, the CPMs and the general accessibility of the CA, corresponds with Habermas' argument that decision-making should not be colonised by an "expertocracy". Nevertheless, the programme did not give grassroots community-based organisations and other historically disadvantaged South Africans the same opportunity to participate in the process as that enjoyed by the more well-resourced groups. In the flawed reality of South Africa, it would have been difficult, if not impossible to do so. In this regard, the PPP of the CA can be seen as the beginning of a new approach to opinion and will formation processes in South Africa. The CA therefore, provided an important example for other lawmaking processes in post-apartheid South Africa. The CA established the foundation for a democratic culture. Their innovative use of outreach mechanisms, can be emulated in other similar processes. The use of the CA-style mechanisms in other legislative processes, will further empower disadvantaged sectors, and thus provide them with an increased opportunity to gain more influence in the public sphere.

The CA discourse, particularly evident in the comprehensive media campaign, gave the impression that it was not the CA who was the final decision-making body, but rather *all* the people of South Africa. Although the advertising campaign had a strong educative focus, there can be little doubt that the media campaign was at least partly used as a modern propaganda mechanism as

described by Habermas, which was used by the CA to "sell" the constitution as a product. As such, the media campaign had little to do with discursive lawmaking and public participation. On the other hand, the CA's media campaign was deployed to educate South Africans about the constitution-making process, to inform them about the developments of the constitution-making process and to teach South Africans about constitutionalism generally. In terms of Habermas' theory, the media campaign can be seen as a stimulation of opinion formation in the public sphere. The face-to-face outreach component of the PPP facilitated for more active participation in the constitution-making process. Accordingly, the media campaign only played a supporting role to the other participation mechanisms in the constitution-making process.

The discursive mechanisms used in the constitution-making process should be used in other law- and policy making processes. The new constitution itself stipulates a framework for public consultation. Section 59 and section 72 of chapter 4 and section 118 of chapter 6, state that legislative processes in Parliament, the National Council of Provinces and the Provincial Legislature must "facilitate public involvement." However, comments from the stakeholders that were interviewed for this thesis indicate that there is already some cause for concern regarding the lack of openness in the legislative processes in Parliament. Tilley who, after the conclusion of the constitution-making process, has continued as the national legislation monitor of the Black Sash, notes that there is a trend towards less openness in Parliament. "Whereas the CA was quite eager to hear what the various organisations had to say, Parliament today is less open to input from civil society." She observes that the attitude to the constitution has changed to the point where it is seen "as an obstacle rather than an enabling mechanism." Saldanha agrees with Tilley's view that it has become increasingly difficult to gain access in order to influence policy- and lawmaking. He says that "Parliament is simply abdicating its responsibility."

South Africa is still in the infant years of its new constitutional democracy. This is a fragile phase and conscious efforts are constantly needed in order to reinforce a democratic culture. The above observations, seem to indicate that legislative processes in Parliament are not applying the Habermasian discursive criteria for lawmaking processes in the way that the constitution-making process did. In a country such as South Africa, where law was characterised by an acute tension between facticity and validity, the post-apartheid political order needs to be particularly aware of the dynamics of law. It is therefore worrying that institutionalised decision-making structures have not followed the example of the CA.

The South African constitution-making process is a valid case study for countries facing the challenge of transition to democracy. Political, cultural and socio-economic differences notwithstanding, the South African constitution-making process has set a very useful example to similar processes. Indeed, the CA process could provide a good example for lawmaking processes in contemporary South Africa.

Appendix 1:

The Constitutional Assembly Budget for the period
1 April 1995 - 31 March 1996.

Please note: This is not the full budget of the CA. The budget period correlates with the operational months of the PPP.

Source: The CA Annual Report 1996

*Expenditure for the period
1 April 1995 to 31 March 1996*

STAFF COSTS R12,350,422

Salaries	R10,826,874
Part-time staff	R319,016
Secondment costs	R310,197
Service Bonus	R590,187
Medical Aid	R2,991
Vehicle Allowance	R156,444
UIF	R7,910
Leave Purchases	R31,457
Staff Training/Staff Costs	R37,863
Staff Hire Costs	R18,797
Temporary Staff	R48,686

ADMINISTRATIVE COSTS R3,164,070

Photocopiers, leasing and paper	R1,213,841
Stationery	R467,075
Computer stationery	R88,410
Postage and courier costs	R156,507
Petty cash	R44,140
Equipment hire, pagers, cellphones	R117,443
Telephone	R382,852
Subscriptions,books, journals,papers	R153,724
Bank Charges	R64,561
Translations	R419,217
Transcriptions	R50,400
Parking, CEP Coordinators	R5,900

TRAVEL COSTS R783,453

Car Hire costs	R79,030
Accomodation, MPs	R13,742
Flights, MPs	R100,915
Subsistence and Travel Allowances,MPs	R68,563
Flights, staff	R302,406
Subsistence and Travel Allowances,staff	R33,208
Accomodation, staff	R185,589

PUBLIC PARTICIPATION PROGRAMME R30,922,400

Public Relations	R27,040
Radio Advertising	R4,667,990
Television Advertising	R1,385,208
Press Advertising	R5,156,385
Production, Advertising	R3,117,467
Outdoor Advertising	R4,252,839
Working Draft of 22 November 1995, Distribution and Printing	R4,923,501
Constitutional Talk Television	R483,930
Constitutional Talk-line	R22,800
Printing of Constitutional Talk, posters and Summary of Working Draft	R1,936,512
Distribution of Constitutional Talk	R857,694
National sector hearings	R723,366
Public Meetings	R903,032
Constitutional Education Workshops	R31,694
Catering	R195,750
CASE Evaluation	R935,780
Subsistence and Travel Costs	R105,969
Flights	R658,484
Accommodation	R424,716
Government Garage Vehicles	R112,243

TECHNICAL COMMITTEES &

PANEL OF EXPERTS R2,748,054

Professional Fees	R2,056,413
Travel and Subsistence	R32,418
Flights, advisors	R432,997
Accommodation, advisors and Panel	R226,226

EQUIPMENT R133,236

Equipment, filing cabinets, shredder etc	R95,407
Computer equipment	R37,829

TOTAL EXPENDITURE R50,101,635

TOTAL BUDGET ALLOCATION R59,423,636

FUNDS AVAILABLE R9,322,001

Foreign funding report

The following funds were raised by the CA for costs relating to the public participation programme:

DONOR	RECEIVED	PLEDGED
Royal Danish Embassy	R1,250,000	R2,500,000
Swiss Development Corporation	R3,500,000	R3,500,000
Swedish Embassy		R6,000,000
Netherlands Embassy		R4,500,000
TOTAL	R4,750,000	R16,500,000

Appendix 2:

A break-down of organisations that participated in the NSHP.

Please note: This is not a complete list of the civil society structures consulted in the NSHP. However, the list serves as an indication of the breadth and the number of organisations that were involved in the sector hearings.

Source: CASE: "Public Participation Evaluation - Reports from CASE" (preliminary report), March 1996.

National Sector Public Hearings (NSPH)

Business sector

Afrikaanse Handelsinstituut; Business SA; SACOB; Chamber of Mines; RAMS; COM; SAF; Business South Africa; SAACE; Foundation for African Business & Consumer Services (FABCOS); SAPOA; COSAB; SAPIA; National African Federated Chamber of Commerce (NAFCOC); SAAU; South African Broadcasting Corporation; Business Day

Youth sector

• SUCA • WAWA • Students for Human Rights • NYDF • RUDCC • WCYF • RYDCC • Boy Scouts of SA • Azanian Student Convention • South African Students Association • SASCO • UCT SRC • ERIP • SATSU • SAU - SRC • IYOSEF • Youth Affairs Desk - Eastern Cape • Ipelegeng Youth Development Programme • Youth Commission - Northern Transvaal • Youth Affairs - Eastern Transvaal • COSAS • Community Youth Service Organisation • ACDP • DP Youth • ANC Youth League • Intando Yesizwe Party Youth League • Dikwankwetla Party Youth • PASO • RDP Office • The President's Award • I Can Training Foundation • Joint Centre for Political & Economic Studies • Baha'i Youth • National Hindu Federation • Christian Youth - ICY • Muslim Youth Movement • True Love Waits • Aids Sexuality Association of Youth Organisation • Young Entrepreneur Foundation • SA Association of Youth Clubs • Western Cape Youth Forum • Swedish Foundation for International Youth Exchange

Traditional authorities sector

• SANCO • Counsellors • Traditional Healers • Women's Delegation • Academics • CONTRALESA
• Royal Councils • Institute for Multi-Party Democracy

Labour sector

• FEDSAL • SASBO • COSATU • NEDLAC • ABSPERSA • SARHWU • FRRP • CAWU
• NACTU • SACCAWU • IMMSA • ILRIG • Khanya College • SA Iron & Steel Union • Black Trade Union of Transnet • National Union of Farmworkers

Women's sector

- N U O Secretariat • Disabled People of South Africa • Gender Equity Unit • COSATU
 - ANC • SA NGO Secretariat • National Council of Women • SANCO • Public Service Commission
 - A C D A • National Party • Independent Development Trust • Ikageng Women's Club • South African Catholic Bishop's Conference • Centre for Applied Legal Studies - Wits • IDASA
 - Black Lawyers Association • C A Sub Theme 3 07 Com 6 • Legal Resources Centre
 - NAWE • Women's Leadership Training • Commonwealth RDP Women's Empowerment Programme
 - International Prayer Women's League • A G E N D A • G N U - Shared Services • CIT • IFP
 - National Women's Resource & Service Centre • Eastern Cape Provincial Legislature
 - S A C P • National Land Committee • UCT - Law Faculty • Women's National Coalition • DOMINA
 - Muslim Youth Movement Gender Desk • Democratic Party • Rural Council for Women
 - The Women's Lobby • African Women Research • Federation of Women's Institutes
 - CALS
 - NADEL • Executives Women's Club • The Baha'i Faith • Rural Foundation • SACCUWU
 - SA Police Services • DBSA • SAAUW • OLIVE • Reproductive Rights Campaign • FAK
 - Women's World Day of Prayer • Dept. of Women's Affairs • Black Housewives Leagues
 - FABCOS • Muslim Women's Federation • Call of Islam • SADTU • Business Day • UNISA
 - Mowbray Women's College • SA Chemical Workers Union • African Women Health Initiative
-
- Agency for African Women in Development • Rape Crisis • Abortion Rights Action Group •
 - Business and Professional Women • Public Service Commission • Women and Environment
 - Women for Women in Government • Women's Bureau • Commission on Women - Northern Transvaal
 - Australian Law Reform Commission • Women's Legal Status Committee • Dames Aktueel
 - Mothers Union CPSA • Faculty of Law - Wits • National Council for Physically Disabled SA
 - Gauteng Provincial Govt. - Office of Provincial Services Commission • COSMOPOLITAN
 - Longwe, Clarke & Associates Development Consultants • FEMINA • SA National Council for Child and Family Welfare

Socio-economic rights sector

- Department of Justice • Cope Affordable Housing • Environmental Justice Networking Forum • Centre for Human Rights • Legal Resources Centre • Centre for Adult Education • ILRIG • Centre for Applied Legal Studies - Wits • Foundation for Contemporary Research • Ad Hoc Committee for Social & Economic Rights • Faculty of Medicine - Univ. of Natal • SPCA • HCPT • TRAC • Rural Foundation • Volkstaatraad • Centre for Conflict Resolution • Lawyers for Human Rights • CORD • Centre for Rural Legal Studies • Urban Services Group • Community Health Association of SA • Centre for Education Policy Development • SACP • SACC • Urban Sector Network • African Centre for the Constructive Resolution of Disputes • Committee of University Principals • SAAU • Sharpeville Legal Awareness Programme • International Movement of Rights & Humanity • Medical Association of SA • SADTU • SA Homeless People's Federation • Animal Groups Alliance • Industrial Health Research Group • Department of Agriculture • SA Red Cross Society • East Cape Land Committee • Akanani Rural Development Association • Interfund • Association of Law Societies • Chamber of Mines • SA Health & Social Services Organisation • NPPHCN • Health Economics Unit • National Land Committee • African Culture & Community Development Association • Farmworkers Research & Resource Project • Disabled People SA • World Conference on Religion and Peace • COSATU • Community Law CC • Institute for African Alternatives • DBSA • Independent Development Trust • Joint Enrichment Project • SANCA • Thusong Educational Trust • Commonwealth Secretariat • OXFAM • OFSRUC • Department of Labour • Department of Community Health • TREE • The Free Marker Foundation of SA • SAWAU • Reproductive Rights Alliance • National Arts Coalition • Earthlife Africa • SA Congress for Early Childhood Development • SACC • Workers' List Party • Independent Board of Inquiry • IDASA • COSAS • Project ABEL • Gender Research Party • Institute of Development Law • Citizen's Advice Bureau • NADEL • Khanya College • PLANACT • PASO • Environmental Monitoring Group • Church of the Province of SA • AHI • Group for Environmental Monitoring • Black Sash • Commission on Provincial Government • Correctional Services
- Surplus People Project • Amnesty International, SA • Development Action Group • NAFCOG • SACO • Housewives League of SA • NEHAWU

Appendix 3:

A break-down of organisations that participated in the CPMs.

Please note: This is not a complete list of organisations that was consulted in the CPMs. The presented list serves as an indication of the breadth and number of structures consulted in the CPMs.

Source: CASE: "Public Participation Evaluation - Reports from CASE" (preliminary report), March 1996.

Constitutional Public Meetings (CPM)

Province	Month	No. of meetings	No. of people
Eastern Cape	February, May & June	3	6 710
Free State	February, May & June	3	1 305
Gauteng	March	1	900
Kwazulu-Natal	June & August	3	1 490
Mpumalanga	February, May & June	3	2 350
North West	February, May & June	3	2 000
Northern Cape	March, May & June	3	1 120
Northern	March & June	3	3 450
Western Cape	Feb., March, May & June	5	1 674
	Total	27	20 999

The 27 CPMs included members of:-

- Political parties: PAC; ANC; NP; ACDP; DP; CP; IFP; Afrikaner Volksfront; SACP; AZAPO; Minority Front; FF
 - Youth bodies: NP Youth Association; ANC Youth League; Youth Clubs; Youth Forums; Youth Voices Newsletter; National Youth Forum; Multivision Youth Development Forums; DP Youth League; RYDF; Rapportryers;
 - Civic associations: SANCO; Local Civic Organisations
 - Women's groups: ANC Women's League; Women's Service Groups; Dames Aktueel; Midlands Women's Coalition; Empangeni Women's Institute; African Housewife League; DP Sakevroueklub; Jong Dames Dinamiek; Oranje Vroue Vereeniging; NP Vroue Aksie; National Council of African Women
 - Tribal authorities/ Traditional local government/Traditional leaders
- e.g. CONTRALESA
- Trade unions: COSATU; SADTU; SAMWU; NEHAWU; NUM; Unemployed Workers Union; United Workers Union of SA
 - Transitional Local Councils
 - Education organisations: schools; principals' associations; teachers' centres; SRCs; PASO; Teachers Forums; Technikons; COSAS; Education & Training Forums; Dept. of Education; Early Learning Centre; Colleges; Dept. of Education; Literacy Projects; Wits Rural Faculty; NECC; Special Educare Remedial

- **Business sector:** Chamber of Business; Chamber of Commerce; Business Forums; SBDC; Islamic Chamber of Commerce; Afrikaanse Sakekamer; Urban Progressive Business; SACOB; Sentrachem Ltd.; Mica Foundation; Afrikaanse Handelsinstituut; NAFCOC; Chamber of Industry; Mine Management
- **Para-statals:** SpoorNet; CSIR; ESKOM
- **Religious sector:** Association of Ministers of Religion; Council of Independent Churches; Lutheran Denominational Women's Prayer Union; Methodist Church; Lutheran Church; Roman Catholic Church; Anglican Church; African Gospel Church; Dutch Reformed Church; NG Kerk; Mahon Church of Africa; Evangelical Lutheran Church; Grace Community Church; SA Council of Churches; Ministers Fraternal; Call of Islam; Afrikaanse Protestantse Kerk; Muslim Society; ACVV; SACC; ZCC; Diakonia
- **Advice offices**
- **RDP forums; Policing Forums; RDP Commission**
- **Ratepayers associations; residents' associations; Home Owners Associations**
- **Health sector:** Hospitals; Aids Training Information Centre; Health Centres
- **Government Departments:** Provincial Legislatures; Premiers Office; MECs; Department of Police; Department of Correctional Services; Department of Agriculture; Department of Transport; Department of Justice; Department of Social Services; Department of Manpower; Department of Post & Telecommunications; Department of Labour; SACS
- **Development organisations:** Development Trust; Independent Development Trust; Rural Development Forums; Community Development Associations; DBSA
- **Elderly sector:** National Council for the Aged; Old Aged Clubs; Old Age Homes
- **City Councils Civics; Town Councils; Regional Services Council; Constitutional Committees; RDP Structures; Joint Services Boards**
- **Sports sector:** Sports Councils
- **Police/Traffic officials:** Traffic Department; Police Forum; SAPS;
- **Multi-party Liaison Committees; Liaison Committees**
- **Legal organisations:** Lawyers for Human Rights
- **Local Affairs Committees:** Indian LAC; Coloured LAC
- **Kruger National Park's Board**
- **Human rights/democracy:** Matla Trust; New Democratic Movement; IDASA
- **Trade unions:** NACTU; FAWU; POPCRU; PPAWU; SARWU; SACCAWU; PASU; CAWU; CWIU; SAPU; SABTU
- **Charity/fund- raising organisations:** Lions Club / Round Table
- **Social work/Welfare organisations:** Christelike Maatskaplike Raad; SANCA; Red Cross Society; SA Black Social Workers Association; Child Welfare; Regional Welfare Board
- **Rural organisations:** Rural Councils; Association for Rural Advancement
- **Other organisations:** SADOU; ECUWU; VG; AGC; UCDP; MORTSA; WE CARE Organisation; PASI; CBOs; Taxi Associations; MUCPP; NGO Council; VLV; Librarians; Senior Rapportryers; Junior Rapportryers; PPMC; YWCA; REDF; NAPTOSA; SACBC; VOSPO; PAG; AF; BNDC; NCAW; Medet; Affirmative Management System; Community Development Trust; Information Service; Hawkers Association; Fundisanane Trust; AGRICOR; XPP; SCM Masakahne Sewing Project; Local Elections Team; Univen; LSC Univen; VENCOCI; Community Art & Museum; NP Indian Traders Association; Farmers Unions; Boere Unie

Appendix 4:

A break-down of organisations that participated in the CEP's Workshops and Briefings.

Please note: This is not a complete list of community-based organisations that participated at workshops and attended briefings. This break-down serves as an indication of the number and breadth of organisations that participated in the CEP.

Source: CASE: "Public Participation Evaluation - CASE Reports" (preliminary report), March 1996.

Constitutional Education Programme

Workshops

Participants in the 181 workshops included members of:-

- Civic associations: SANCO
- Transitional Local Councils (TLC)
- Political parties: ANC
- Women's groups: Masibambane Women's Project; National Council of African Women; ANC Women's League
- Trade unions: SADWU
- Religious bodies: Assembly of God; Christian Service Foundation; Justice & Peace
- Development committees; Development foundations; Community Development Forums
- Community associations; Community projects; Rural Development Forums
- Education bodies: Education Trusts; Education Projects; University and College SRCs; Early Learning Centre
- Hospitals/ Primary Health Care Organisations
- Legal organisations: Legal Aid Centre for Human Rights; Community for Legal Awareness
- Government bodies: Department of Agriculture
- Tribal associations/Tribal authorities
- Other organisations: Share; CEMADT; Welcome Home Centre; SAPHOR; CANSA; Development Resource Centre

Briefings

Participants at the 209 briefings included members of:-

- Development Forums; District Development Forums
- Trade unions/union federations: NACTU; PPAWU; COSATU
- Women's groups: Women's National Coalition, the Black Sash
- Tribal authorities
- Residents' associations
- Advice centres/offices
- Prison organisations
- Civic associations: SANCO
- Legal organisations: Lawyers for Human Rights; Legal Aid Centres
- Youth organisations: Youth Interaction Committees; Youth Affairs Department
- Educational organisations: Project Vote; COSAS
- Church/religious groups: Ministers Fraternal; Justice & Peace
- Transitional Local Councils
- Human rights/democracy organisations: IDASA; PACSA; Local Peace Committees
- Political parties: DP; ANC
- Hospitals
- Government bodies: Gender Commission
- Other organisations: YWCA; Disabled People of SA; NGO Forums and the CBO Network; Chamber of Business;

Appendix 5:

Six examples of submissions received by the Constitutional Assembly.

Source:

"The making of a Constitution. The story of South Africa's Constitutional Assembly, May 1994 to December 1996."

Published for the Constitutional Assembly, March 1997 (ed. Paul Bell).

Published by Hugh Murray at Churchhill Murray Publications.

In search of a separate freedom

Dear Sir

PROPOSALS ON SELF-DETERMINATION AND A VOLKSTAAT

I wish to point out that Afrikaners are an indigenous white nation of South Africa, similar to other nations who are also part of South Africa. Therefore everyone has a right to land and a right to realise their language, culture, objectives, religion, etcetera.

Principle No 34 of the constitution also stipulates the right to self-determination of all nations in South Africa.

The Afrikaner nation therefore has a right to self-determination, namely territorial self-determination in a Volkstaat and cultural self-determination outside the Volkstaat.

A. Cultural Self-determination

In areas with sufficient support for Afrikaner self-determination but where it is impossible to be part of a Volkstaat, Afrikaner councils should be introduced to look after the language, culture and education of the Afrikaner. Registration to become a member of Afrikaner councils should be voluntary.

B. Territorial Self-determination: Volkstaat

Enough land should be available for the Volkstaat to be viable. The majority should be Afrikaners. Parts of the former Boere Republics should be the core of the Volkstaat, namely Transvaal and Free State; after all, these were recognised territories and republics belonging to Afrikaners.

The Volkstaat should have its own parliament elected by Volkstaat Burghers. The Volkstaat should be able to take decisions on its language, culture, education, religion, security forces and other general matters.

The Central Government should not interfere with the Volkstaat.

The Volkstaat should therefore have more power than ordinary provincial authorities.

Provision should be made for secessions if necessary

C. Volkstaat Council Reports

The Volkstaat Council's first reports should be studied meticulously. They include many positive points which should enjoy serious consideration.

Reports cover inter alia where the Volkstaat should be situated, what it should look like, its citizenship, economy, relations with the rest of South Africa and of course cultural self-determination.

Negotiations between the Vryheidsfront (Freedom Front) and the ANC and what is arising therefrom should be taken into account.

D. Conclusion

A Volkstaat should offer the Afrikaner cultural and territorial self-determination. This is part of South Africa's solution without which Afrikaners and the rest of South Africa's population will only deteriorate. Self-determination will result in freedom, peace and success.

Thanking you,

FRIK LOTZ - ordinary member of the Vryheidsfront

* The Vryheidsfront identifies itself only with those parts of the constitution that deal with self-determination as expressed in the Vryheidsfront.



VOICES OF THE PEOPLE

Live and let love

RE: Equality - Chapter 2, Article 8.2

Thank you for including the clause for sexual orientation in the draft document for the New Constitution. I would like to plead that you include it in the final document too.

Never before were our group - that is the Gay and Lesbian people of South Africa - taken into consideration. We were discriminated against and even beaten up for no reason. Some of my friends were fired from work when the oppressors found out what their sexual orientation were even though there were no complaints about their work.

Since the draft document for the New Constitution was announced things have started to change for us. More of us could come out in the open without the fear of being oppressed. We can live a normal life and love our partners without being persecuted. Is that not what we want, to live in peace, love and harmony with our loved ones with no discrimination whatsoever?

We want to love, get married legally, raise our children and be accepted in all walks of life. We have rights because we are human beings.

We have to stand together and join in the struggle for equal rights!

Thank you

Miss M van Greuning



In defence of the family

Dear Sir

In my view, this is how the Constitution should look like:

Maintenance: If a husband fails to cater for his wife and children, and the woman resorts to the Maintenance courts, she should be allowed to get all his salary, on a monthly basis. When he is due for an increment, it should also be given to his wife. The husband should be left with only enough money for transport. I say this because these men refuse to give their wives money. Instead, they start businesses for their mistresses and make them rich. When they are rich, they forget the men and tell them that they are stupid. The wife and children experience difficulties as though there was never a husband in the home ...

This is a very painful matter because, when you were married, you, the wife, had high hopes that, out of the four or so children with whom you have been blessed, you were going to produce a doctor, a judge, a magistrate and an accountant. However, due to the fact that the woman is the only breadwinner, while the husband is involved with his stupid affairs, this does not happen. Your meagre salary is just enough for food and for the payment of services ...

Sir! We are sick and tired of these randy men who are not even afraid of AIDS ... I propose that polygamy should be prohibited by law. When a man chooses a woman as his life-partner, and vows in front of a marriage officer that "till death do us part", the law must ensure that this happens ...

Thank you

Joyce Khanye



Protect the farm people

Sir/Madam

I am at the moment residing on a farm Diepdrift (Warmbaths). I was born and brought up on this farm where my father worked for so many years as a labourer. We stayed on this farm for +- 60 years.

I am impressed by chapter 2 of the bill of rights, i.e. Housing and land. 25 (2) No one may be evicted from their home arbitrarily and without an order of court made after considering the relevant circumstances.

I am very much concerned about people staying on the farms. May the constitution (final) please protect the farm people. They have been harassed by white people for so many years and they are still harassed. I think this is because of the fact that they are taken as illiterate, non striking, non demonstration as compared to people staying in urban places (location).

My father is 81 years of age and he has hearing disability and sight (blind) disability and because of (maybe) transformation he is asked to leave the farm. We are living in fear under intimidations and so on.

Included find a letter from the farm owner whom my father worked for until he was a pensioner. In the New Constitution my first glance will go to the clause that has something to say about farm workers/labourers, what is their right etc.

Thank you very much for the wonderful job that you are doing. May God bless you and the people of South Africa as a whole.

Yours faithfully

SGD SS MASAPHOLO



VOICES OF THE PEOPLE

"I'm part of the future"

The Secretariat

I am a sixteen year old in standard eight at Wynberg Boys High School. I wish to express my view on the subject of abortion on demand.

I am totally against abortion. I feel abortion is going to bring a kind of curse on the land. Every life has a right to live. I have spoken to many people in my school and many are against abortion on demand.

I hope you can listen to me, for I am a part of the future of this country.

Yours faithfully

J Plows



VOICES OF THE PEOPLE

A matter of life and death

Dear Sirs

I do not see the good of inviting our views, suggestions or inputs if the Constitutional Court will not heed them. I am still strong about reimposition of the death penalty and I have the backing of the majority of South Africans. Your preachings of Human Rights should go together with the Scriptures: Exodus 21:12.

I am sure you are aware of the increased crime and violence since the announcement of the abolition of the death penalty. The majority of the society feel the government is letting them down and thus, want to take the law into their hands. Surely you do not want that situation.

If the Constitutional Court has a final word regardless of the facts of most of the South Africans, is that not iron hand or dictatorship and how different is that from Sani Abacha's rule?

Why is the Constitutional Court prepared to have other issues discussed but not this? Your declaration of the right to live seems to refer to the perpetrator meaning that the victim's life is priceless. But the actual fact is that the killer has given up the right to his own life.

If you say this is democracy, then surely the word democracy has lost its meaning.

Yours faithfully

SGD HUMPHREY MATI



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